No. 84-1422

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

B.R. MacKAY & SONS, INC.,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,
BY NEIL F. HARTIGAN,
ATTORNEY GENERAL OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

NEIL F. HARTIGAN
Attorney General, State of Illinois
JILL WINE-BANKS
Solicitor General, State of Illinois
160 North LaSalle Street, Suite 800
Chicago, Illinois 60601
(312) 793-7307
Attorneys for Respondent

MICHAEL A. FICARO *
Director of Enforcement
STEVEN F. MOLO
Assistant Attorney General
Of Counsel

* Counsel of Record
(312) 793-7710

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QUESTION PRESENTED

Whether the Fifth Circuit erred in holding that the district court did not abuse its discretion in allowing the Illinois Attorney General, a nonparty, to use a lawfully obtained discovery deposition to expose a fraud that Petitioner perpetrated on an Illinois state court in a civil environmental action.

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The per curiam opinion of the United States Court of Appeals for the Fifth Circuit, entered on January 10, 1985, is unreported. (App. A) The memorandum opinion of the United States District Court for the Eastern District of Louisiana, entered March 28, 1985, also is unreported. (App. B)

JURISDICTION

This Court maintains jurisdiction to review the judgment of the Fifth Circuit pursuant to 28 U.S.C. Sec. 1254(1).

STATEMENT

This case concerns the Attorney General of Illinois' use of a discovery deposition, taken in a New Orleans federal lawsuit, to expose a fraud perpetrated on the Cook County, Illinois Circuit Court in another lawsuit.

The Petitioner in this action is B.R. MacKay & Sons, a Utah corporation engaged in the silver refining business. The Respondent is the Attorney General of Illinois.

The parties to this case currently are involved in a civil environmental matter pending in Cook County Circuit Court, an Illinois trial court. The suit concerns civil liability for the clean-up of hazardous waste in the form of 16 million pounds of cyanide contaminated film chips illegally generated and stored by Petitioner, B.R. MacKay & Sons (BRM) and its subsidiary Film Recovery Systems. Film Recovery Systems was engaged in the business of recovering silver from scrap film. The State of Illinois already has spent $4 million to decontaminate the hazardous waste.

Petitioner Files Fraudulant Pleadings To Obtain Dismissal From Cook County Lawsuit

In May of 1983, the Attorney General of Illinois sued several defendants in an effort to clean-up the hazardous

waste. Petitioner, BRM, moved to dismiss the Chicago lawsuit, alleging that it lacked sufficient contacts with Illinois to be subject to Illinois personal jurisdiction. In support of its motion, Petitioner filed sworn affidavits of Michael MacKay, president of Petitioner BRM, stating in substance that Petitioner did not conduct business in Illinois.

Specifically, the affidavits state:

> —that BRM "has no employees within the State of Illinois."
>
> —that BRM "has not sold or distributed products or services in Illinois."
>
> —that "at no time has BRM engaged in the business of processing scrap film for the recovery of silver in Illinois."
>
> —that "at no time has BRM stored the x-ray film chips resulting from such process in Illinois."
>
> —that Michael MacKay at no time "engaged in the business of recovering silver from scrap film in Illinois."

(App. D-15 through D-20)

Based on Michael MacKay's affidavits and assurances by Petitioner that they were truthful, the Attorney General consented to the court's dismissal of Petitioner from the Chicago suit. Petitioner agreed to loan $90,000 to another defendant, its subsidiary Film Recovery Systems (FRS), to be paid to a trust fund for the clean-up of the cyanide contaminated film chips. The Attorney General's Office consented to the court's dismissal of Petitioner, based on the affidavits, because the chief concern of all government agencies involved in the matter was the protection of the health and safety of the People of Illinois through the swift and thorough clean-up of the dangerous hazardous waste problem. The Attorney General's Of-

fice relied upon the affidavits in good faith and consented to the dismissal on July 26, 1983 to expedite the clean-up.

The Attorney General's Office Discovers Petitioner's Fraud And Exposes It To The Cook County Court

The hazardous waste problem achieved national notoriety. A Polish immigrant worker at the plant where the chips were generated had died from exposure to cyanide. The Cook County State's Attorney (the district attorney/criminal prosecutor for the greater Chicago area) had indicted several managers of the plant, including Michael MacKay, for murder in connection with the death of the immigrant worker.[1]

On August 12, 1983, the Attorney General's Office received an unsolicited telephone call from A.D. Freeman, counsel for New Orleans Silversmiths, a New Orleans business that had a civil lawsuit pending against Petitioner in federal court in New Orleans. Petitioner had moved to dismiss the New Orleans suit for lack of personal jurisdiction. The matter had been referred to a Federal Magistrate for discovery on the issue of the extent and location of Petitioner's business activities, for purposes of deciding the personal jurisdiction issue.

Silversmiths' lawyer informed the Attorney General's Office of Silversmiths' suit against Petitioner. On August 18, 1983, Silversmiths' lawyer sent the Attorney General's

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[1] The Attorney General's Office is not involved in the criminal prosecution resulting from this matter. The Attorney General's Office is concerned solely with civil liability for violation of Illinois environmental laws. For discussion of the distinction between the powers of the Attorney General's Office and the county State's Attorney in Illinois *see, The Relationship Between the Attorney General and the State's Attorney in Illinois*, 1949 Ill. L.F. 507 (1949).

Office copies of pleadings and exhibits filed in the New Orleans suit.

Based on the information obtained from Silversmiths and from other sources, the Attorney General's Office determined that Petitioner had conducted business in Illinois. Thus, the affidavits filed by Michael MacKay, stating that Petitioner did not do business in Illinois, were false. Accordingly, the Attorney General's Office petitioned the Cook County Circuit Court to reopen the Chicago lawsuit against Petitioner.

The Attorney General's motion to reopen the Chicago suit alleges that Petitioner obtained its dismissal from the Chicago lawsuit fraudulently, by filing false and misleading affidavits with the court. The New Orleans pleadings and exhibits received from Silversmiths were attached to the motion as exhibits.

The Magistrate Enters A Protective Order Pertaining To Documents Only

On September 28, 1983, the New Orleans Federal Magistrate entered a protective order that prohibited the dissemination of *documents* produced in discovery on the New Orleans personal jurisdiction issue. (App. C-2) The order is a specific order limited to documents only and does not mention depositions.

Petitioner's Deposition Reveals Further Evidence Of Fraud

On October 3, 1983, Silversmiths deposed Petitioner through its president, Michael MacKay, pursuant to FRCP 30(b)(6). In that sworn deposition, Michael MacKay testified that Petitioner was involved in the processing of scrap film in the Chicago area and was responsible for the business activities at the Film Recovery Systems

plant at which the chips were illegally generated. Thus, the statements of Michael MacKay in his sworn deposition contradict the statements of Michael MacKay in his sworn affidavits filed with the Cook County Circuit Court.

Specifically, the deposition states:

—that BRM was involved in the processing of scrap film in Illinois. Deposition, pages 22-23. (App. D-31)

—that BRM paid for the rent of the property on which Film Recovery Systems, the abandoned Chicago silver recovery plant, operated. Deposition, pages 51-52. (App. D-39)

—that BRM Film Division purchased scrap film in Chicago. Deposition, page 51. (App. D-38)

—that Film Recovery Systems' employees were authorized to draw on money deposited by BRM in an account with the Utah bank and that account was funded generally by BRM. Deposition, pages 53-54. (App. D-40)

—that BRM paid the salaries of Film Recovery Systems' employees. Deposition, pages 61-67. (App. D-43)

—that the Comptroller of BRM exercised control over the expenditures of Film Recovery Systems. Deposition, page 54. (App. D-40)

The deposition did not incorporate or include as exhibits any document covered by the September 28, 1983 order.

The Attorney General's Office Receives And Disseminates The Deposition

On October 31, 1983, the Attorney General's Office received a copy of the transcript of the sworn deposition testimony of Michael MacKay from Silversmiths' lawyer. The transcript of the deposition was not subject to any protective order at that time. *Cf.* (App. C-2) and (App. C-3)

During the first week of November, 1983, the Attorney General's Office disseminated the transcripts of Michael MacKay's deposition to Tyrone C. Fahner, the trustee in bankruptcy for Film Recovery Systems. The Cook County State's Attorney also requested the deposition for purposes of its criminal investigation and the Attorney General's Office forwarded a copy of the deposition transcript to him. Thus, the Attorney General, a non-party, received and disseminated the deposition prior to the court's order prohibiting parties from disseminating depositions.

The Attorney General's Office Seeks Documents And The Protective Order Is Expanded To Preclude Parties From Disseminating Depositions

On November 21, 1983, the Attorney General of Illinois moved to intervene in the New Orleans litigation for the limited purpose of modifying the protective order, which covered the documents only at that time. The Attorney General sought to obtain new protected discovery documents. The Attorney General's Office sought to use those documents in an attempt to reinstate Petitioner as a defendant in the civil lawsuit in Cook County Circuit Court.

On November 23, 1983, the Magistrate deferred ruling on the Attorney General's petition to intervene pending a determination by the Cook County Circuit Court on whether Petitioner would be reinstated as a defendant in the civil lawsuit in Cook County. Further, on November 23, 1983, the court ordered that the protective order be expanded to include the October 3, 1983 deposition of Michael MacKay which the Attorney General's Office already possessed and disseminated. (App. C-3)

The Attorney General's Office Provides The Cook County Circuit Court With The Deposition, Which Was Received And Disseminated Prior To The Expanded Protective Order

On January 6, 1984, the Attorney General's Office filed with the Cook County Circuit Court a supplemental petition to reinstate Petitioner as a defendant. The supplemental petition alleged facts in addition to those set forth in the Attorney General's initial petition. All the allegations of the supplemental petition further demonstrate that Petitioner did conduct business in Illinois and was responsible for the illegal generation, transportation, and storage of the hazardous waste at issue in Cook County. Included in the supplemental petition are portions of the transcript of the deposition of Michael MacKay taken by Silversmiths during the New Orleans litigation. (App. D)

The Attorney General's Office attached the portions of the deposition of Michael MacKay in the good faith belief that the protective order did not prohibit it from doing so because: the Attorney General's Office obtained the deposition prior to the entry of the expanded protective order; the Attorney General's Office disseminated the deposition prior to the entry of the expanded protective order; and the protective order barred only dissemination of the documents *by the parties* to the New Orleans suit and although the Attorney General's Office sought to intervene in that suit, leave was not granted and it was not a party and is not now a party.

The Magistrate Enters The "Emergency Protective Order"

On January 11, 1984, Petitioner sought an emergency protective order from the Magistrate. Petitioner alleged that the Attorney General's Office violated the protective order by filing portions of the deposition of Michael Mac-

Kay with the Cook County Circuit Court on January 6, 1984. On January 11, 1984, the Magistrate ordered that the Attorney General's Office retrieve the documents filed in the Cook County Circuit Court, and return them to the Magistrate. (App. C-4) An Assistant Attorney General immediately contacted the many parties to the Chicago lawsuit, and others to whom the deposition had been disseminated, and requested that they return the deposition pursuant to the Magistrate's order.

The Magistrate Vacates The Original Protective Order And Petitioner And Silversmiths Settle The Case

Further, on January 11, 1984, the Magistrate vacated the protective order on the motion of Silversmiths. The Magistrate based his order on his review of the documents and finding that they were "not of a sensitive or privileged nature." (App. C-6)

On January 17, 1984, New Orleans Silversmiths and Petitioner agreed to settle and dismiss the New Orleans lawsuit. As a condition of the settlement, the parties agreed between themselves to reinstate the protective order. The Magistrate reinstated the protective order on January 20, 1984.

The Magistrate Refuses To Vacate The "Emergency Protective Order" And The Attorney General's Office Is Barred From Further Use Of The Deposition

On January 27, 1984, the Attorney General's Office moved to modify the protective order, or in the alternative, for reconsideration of the Magistrate's January 20, 1984 order reinstating the protective order. The Attorney General's Office sought to use the deposition for the limited purpose of reinstating Petitioner as a defendant

in the Chicago lawsuit by exposing the fraud Petitioner perpetrated on the court. Further, on January 27, 1984, Petitioner sought sanctions and a contempt citation against the Attorney General for filing the portions of Michael MacKay's deposition with the Cook County Circuit Court.

On February 14, 1984, the Magistrate denied Petitioner's motion for sanctions and a contempt citation. The Magistrate denied the Attorney General's motion to modify the protective order to allow the Attorney General to use the deposition.

The District Court Reverses The Magistrate And The Fifth Circuit Affirms

The Attorney General sought timely review of the Magistrate's order by the district court. On March 28, 1984, the district court reversed the Magistrate's order. The district court noted that the November 21 order that purported to expand the protective order to include depositions did not even purport to bind the Illinois Attorney General, a nonparty. Moreover, the court recognized that the Attorney General's Office already had the deposition when the Magistrate entered the November 21 order. The court correctly reasoned that neither the Magistrate, nor the parties by agreement, could bind a nonparty and require him to return documents which were obtained lawfully. Further, the court held that it was error to attempt to require that the Cook County Circuit Court expunge material that was lawfully made part of its record. In reviewing the Magistrate's attempt to bind the Attorney General's Office and Cook County Circuit Court, it stated "[t]he most charitable comment that can be made about that order, for which we accept responsibility, is that it was inadvertent." (App. B-4)

Thus, the District Court held that no previous order affected the right of the Attorney General's Office to make

lawful use of any document or deposition it had obtained. Accordingly, the court ordered that the previous orders of the Magistrate be modified to the extent that they purported to prohibit such use.

Petitioner appealed the district court's order to the Fifth Circuit. On January 8, 1985, the Fifth Circuit heard oral argument on Petitioner's appeal. Two days later, on January 10, 1985, the court issued its per curiam opinion affirming the district court. The court held that the Attorney General's Office obtained the deposition lawfully because it was not covered by a protective order at the time Silversmiths' lawyer sent it to the Attorney General's Office. Further, the court reasoned that the Magistrate's order that attempted to require the Attorney General's Office to return the deposition could not be given retroactive effect because the Attorney General's Office was never a party, and distributed the deposition prior to the expanded protective order.

Summary Of Relevant Dates And Events

May 19, 1983
New Orleans Complaint filed.

July 26, 1983
Petitioner dismissed from Chicago lawsuit.

August 12, 1983
Attorney General receives unsolicited telephone call from A.D. Freeman, Silversmiths' counsel in New Orleans suit.

August 18, 1983
A.D. Freeman sends Attorney General's Office copies of the pleadings and exhibits in the New Orleans suit.

September 28, 1983
Magistrate enters protective order prohibiting *parties* from disseminating discovery *documents.*

October 3, 1983
Silversmiths deposed Michael MacKay pursuant to FRCP 30(b)(6).

October 31, 1983
Attorney General's Office receives copy of MacKay's deposition from Silversmiths.

First Week Of November, 1983
Attorney General's Office first disseminates MacKay's deposition.

November 21, 1983
Attorney General's Office moves to intervene in New Orleans litigation for the limited purpose of modifying the protective order to allow the Attorney General access to discovery documents in addition to the pleadings, exhibits and deposition the Attorney General's Office lawfully possessed.

November 23, 1983
Magistrate defers ruling on the Attorney General's Petition to Intervene.

November 23, 1983
Magistrate expands protective order to include the October 3, 1983 deposition of Michael MacKay which the Attorney General's Office already lawfully possessed.

January 6, 1984
Attorney General's Office files supplemental petition to vacate order dismissing Petitioner from Cook County Circuit Court hazardous waste suit. Portions of Michael MacKay's October 3, 1983 deposition are filed as exhibits.

January 11, 1984
Petitioner seeks emergency protective order and Magistrate orders that the Attorney General's Office retrieve and return all portions of the October 3, 1983 deposition filed and disseminated in the Chicago litigation.

January 11, 1984
Magistrate vacates the protective order stating that the documents subject to the order were "not of a sensitive or privileged nature."

January 17, 1984
The parties to the underlying New Orleans litigation agree to settle and dismiss the suit.

January 20, 1984
The protective order is reinstated by agreement of the parties as a condition of settlement.

January 27, 1984
Attorney General's Office moves for reconsideration of January 20, 1984 order or in the alternative to modify the protective order to allow the use the deposition of Michael MacKay to expose the fraud perpetrated on the Cook County Circuit Court.

January 27, 1984
Petitioner moves for sanctions and contempt citation against Attorney General's Office.

February 14, 1984
Magistrate denies the Attorney General's Office request to use the deposition of Michael MacKay to expose the fraud perpetrated on the Cook County Circuit Court and denies Petitioner's motion for contempt and sanctions.

March 28, 1984
District court issues order reversing the Magistrate's orders attempting to bind the Attorney General's Office and Cook County Circuit Court and upholding the right of the Attorney General's Office to use materials which were lawfully obtained.

January 10, 1985
United States Court of Appeals for the Fifth Circuit affirms the district court.

REASONS FOR DENYING THE WRIT

I.

THE FIFTH CIRCUIT'S DECISION CONFORMS WITH ESTABLISHED LAW.

The Fifth Circuit held that the Attorney General's Office could use the deposition because it received it lawfully, prior to the entry of the protective order covering depositions. Further, the court held that the Attorney General's Office could not be bound by the protective orders because it was not a party. This decision conforms with the established law on the issue and does not conflict with the decisions of any other circuit court.

The Attorney General's Office Obtained The Deposition Lawfully

The Attorney General's Office received, unsolicited, pleadings and exhibits from Silversmiths' counsel on August 21, 1983. The Magistrate entered an order barring the parties from disseminating discovery *documents* on September 28, 1983. (App. C-2) Thus, the Attorney General's Office learned of the suit and received pleadings and exhibits before any protective order was entered.

The Attorney General's Office received the deposition from Silversmiths' counsel on October 31, 1983. The Magistrate entered an order barring the parties from disseminating the *depositions* on November 23, 1983. (App. C-3) Thus, the Attorney General's Office received the deposition before it was unlawful for a party to disseminate it to the Attorney General's Office or anyone else.

If Petitioner feared that the deposition required protection from dissemination, it should have sought a protective order at the time the deposition was taken.

A party seeking protection from discovery abuses must make timely application for a protective order. *See, Interstate Cigar Co. v. Consolidated Cigar Co.*, 317 F.2d 744 (2d Cir. 1963); *United States v. International Business Machines*, 79 F.R.D. 412 (S.D.N.Y. 1978). Although the Magistrate's November 23, 1983 protective order prohibited the parties from disseminating depositions, nothing prevented dissemination prior to the entry of that order.

In *Iowa Beef Processors v. Bagley*, 601 F.2d 949 (8th Cir. 1979), the court held that a nonparty lawfully obtains discovery documents as long as there is not a valid protective order in effect at the time. In *Iowa Beef* the court found that a district court improperly modified a protective order to allow dissemination of discovery materials. The plaintiff sought the return of the materials from the nonparty to whom they were disseminated.

The court held that notwithstanding the trial court's improper modification, the nonparty received the documents while there was no protective order in effect. Accordingly, the court reinstated the full protective order but held that the nonparty had lawfully obtained the discovery materials.

Similarly, the Attorney General's Office received the discovery materials while there was no protective order in effect preventing any party from disseminating the materials to any nonparty, including the Attorney General's Office. Moreover, unlike *Iowa Beef*, in this case the nonparty did not receive the deposition as the result of an improperly modified protective order. When the Attorney

General's Office received the deposition on October 31, 1983, no protective order barring dissemination of depositions had been entered. Accordingly, the Attorney General's Office lawfully obtained the deposition.

The Magistrate's Protective Orders Could Not Bind The Attorney General's Office, A Nonparty To The Suit

To be bound by a protective order issued in a lawsuit, a person must be a party to the lawsuit. *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949 (8th Cir. 1979). The Attorney General's Office was never made a party to the New Orleans litigation. Accordingly, the Magistrate's protective orders could not restrain it from disseminating discovery materials which it obtained lawfully.

The Attorney General's Office sought leave to intervene in the New Orleans litigation for the limited purpose of modifying the protective order to receive documents in addition to those it already lawfully possessed. An intervenor does not become a party until the court grants the motion to intervene. *See, E.E.O.C. v. Strauburger, Price, Kelton, Martin and Units*, 626 F.2d 1272, 1275 (5th Cir. 1980); *Burlington Hospital v. Charles Pfizer & Company*, 48 F.R.D. 343 (S.D.N.Y. 1969). The Magistrate did not grant the Attorney General's Office motion to intervene. Thus, the Attorney General's Office was never a party to the action and could not be bound by the Magistrate's order purporting to require him to retrieve documents which were disseminated in Chicago.

In *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949 (8th Cir. 1979), the Eighth Circuit held that a nonparty who receives discovery documents, which subsequently become the subject of a protective order, cannot be required

to return the discovery documents to the parties because a protective order later issues. *Iowa Beef* involved an appeal of a district court's dissolution of a protective order in protracted private antitrust litigation in the meat industry. The district court granted plaintiffs a protective order barring the parties from disseminating discovery documents. The court determined that the documents contained confidential business information which could be highly damaging to the plaintiffs' business if disseminated.

During the course of the private antitrust litigation, the United States House of Representatives Subcommittee on Small Business became interested in pricing practices in the meat industry and served a subpoena on the defendant, requiring him to produce certain documents covered by the protective order. The defendant moved to dissolve the protective order and the district court partially lifted the order to the extent necessary to comply with the subpoena. The Subcommittee then received the documents.

The plaintiff appealed the district court's modification of the protective order and moved to require the Subcommittee to return the documents to the district court and refrain from any future use or dissemination of the documents or their contents. The court found that the district court erred in modifying the protective order and ordered that it be reinstated. However, the court held that the Subcommittee obtained the documents lawfully and because the Subcommittee was not a party to the litigation, the court lacked the authority to order that it return the documents.

Similarly, in this case both the district court and the Fifth Circuit correctly held that the Magistrate could not order the Attorney General's Office, a nonparty, to return or refrain from using the deposition it received lawfully. The Attorney General's Office was never made a party.

Contrary to Petitioner's contention, the decision below does not conflict with this Court's holding in *Seattle Times v. Rinehart*, 52 U.S.L.W. 4612 (May 22, 1984). The issue litigated in *Seattle Times* differs significantly from the issue presented here. This case involves a nonparty, who is a public official, using a lawfully obtained deposition to expose a fraud perpetrated on another court. *Seattle Times* involved a party publishing discovery materials in violation of an existing protective order by which it was bound. That party then challenged the constitutionality of the existing protective order. The Attorney General's Office has not challenged the constitutionality of the protective orders in this case. Rather, the Attorney General's Office has maintained that it has not violated those orders or been bound by them.

The Attorney General's Office was never a party to the New Orleans litigation and received the pleadings, exhibits and deposition lawfully. Thus, the decision below is correct and the petition should be denied.

II.

THE RESULT BELOW COMPORTS WITH THE DECISIONS OF THIS COURT AND ALL CIRCUITS CONSIDERING THE QUESTION OF A NONPARTY USING SEALED DISCOVERY IN OTHER CIVIL PROCEEDINGS.

A nonparty is entitled to access to discovery kept under a protective order if that discovery could be of use to the nonparty in other pending civil litigation. The nonparty's right to access is founded in the common law and traditional notions of fairness. In *Ex Parte Uppercu*, 239 U.S. 435 (1915), decided long before the drafting and adoption of the Federal Rules of Civil Procedure, this Court held that discovery materials kept under seal could be used in other civil proceedings. Justice Holmes explained:

> [t]he right to evidence to be obtained from an existing object does not depend upon having an interest in it, . . . upon having an interest in the original cause, or upon the object being admissible or inadmissible in the cause for which it was prepared, or upon the right or want of right of the public to examine the thing. The necessities of litigation and the requirements of justice found a new right of a wholly different kind. So long as the object physically exists, anyone needing it as evidence at a trial has a right to call for it, unless some exception is shown to the general rule.

239 U.S. at 437. More recently, several circuits have been confronted with the same question and have reached an identical result.

The Seventh Circuit discussed the issue in two cases. In *American Telephone & Telegraph Co. v. Grady*, 594 F.2d 594 (7th Cir. 1979), the federal government sought access to documents kept under an agreed discovery protective order in a private antitrust suit. The government moved for modification of the protective order to allow use of the discovery documents in the government's independent civil antitrust suit against the defendant. The court affirmed the district court's modification of the protective order, noting, "[w]e are impressed with the wastefulness of requiring government counsel to duplicate the analyses and discovery already made." 594 F.2d at 597.

Similarly, in *Wilk v. American Medical Association*, 635 F.2d 1295 (7th Cir. 1980), the State of New York sought access to documents kept under a protective order in a private antitrust suit. New York moved to intervene in the private suit for the limited purpose of seeking modification of the protective order to allow use of discovery documents in New York's independent civil antitrust suit against the defendant. The district court denied modifica-

tion of the protective order and the Seventh Circuit reversed, relying on *Grady* and *Uppercu*.

Judge Wisdom, writing for the court stated that access to nonprivileged documents should be allowed absent an appropriate showing of injustice under FRCP 26(c). He stated, "such modification can be denied only where it would tangibly prejudice substantial rights of the party opposing modification." *Id.* at 299. Moreover, he reasoned, "[f]or in addition to the abstract virtues of sunlight as a disinfectant, access in such cases materially eases the tasks of courts and litigants and speeds up what may otherwise be a lengthy process." *Id.*

The Second Circuit reached the same result in *Olympic Refining Company v. Carter*, 332 F.2d 260 (2d Cir. 1964). A nonparty sought access to documents subject to protective orders in a government antitrust suit that the parties had settled three years earlier. The court held that notwithstanding the settlement and protective orders, the nonparty was entitled to have the orders modified.

The court stated that it was immaterial that the nonparty might obtain the same information through discovery in its own suit or that some of the documents obtained might be inadmissible at trial. Thus, the court concluded that the agreed protective orders reached under the settlement could be modified to permit the nonparty access to discovery.

Although the Fifth Circuit did not address the issue directly, in *United States v. United Fruit Company*, 410 F.2d 553, 556 (5th Cir. 1969) it stated in dicta that if it were confronted with the question, it would order modification to allow a nonparty access to discovery under seal for use in other litigation. In support of this it cited *Uppercu*.

The Second Circuit's case *Martindell v. ITT*, 594 F.2d 291 (2d Cir. 1979), cited by Petitioner, is distinguishable. *See, Wilk* at 1299-1300. In *Martindell* the Justice Department sought to use civil depositions under a protective order as part of a criminal investigation. The court upheld the district court's denial of the request to modify the protective order. The court reasoned that in pursuing a criminal matter, the federal government has investigatory tools such as the grand jury to aid its search for information. In contrast, litigants in a civil matter, such as the Attorney General's Office in this action, lack the same broad investigatory powers. The court in *Wilk* noted this distinction and held *Martindell* inapplicable in cases where a nonparty seeks access to discovery for use in another civil lawsuit.

In this case, the court below did not discuss the specific issue of modification of the protective order on the motion of the nonparty, the Attorney General's Office. It was not necessary because the court found that the Attorney General's Office received the deposition prior to the entry of the deposition protective order and because the Attorney General's Office was not bound by the protective orders because it was not a party. Accordingly, the court held that the Attorney General's Office could use the deposition. However, the result of the decision of the court below is further supported by the unanimous decisions of this Court and the circuits considering the question. All have held that a nonparty is entitled to access to discovery kept under seal if the nonparty needs that discovery for another civil proceeding.

III.

REVERSAL OF THE ORDER BELOW WOULD RESULT IN A MANIFEST INJUSTICE AND A CORRUPTION OF THE INTENTS AND PURPOSES OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Petitioner seeks to use the protective order to conceal a fraud it has perpetrated on the Cook County Circuit Court and the Attorney General's Office. To avoid potential liability for the clean-up of hazardous waste, Petitioner filed sworn affidavits of Michael MacKay with the Attorney General's Office and the court. Michael MacKay's affidavits state in substance that Petitioner lacked sufficient minimal contacts with Illinois to be subject to personal jurisdiction in Illinois. Based on those affidavits, the court determined that Petitioner could be dismissed from the Chicago lawsuit.

The sworn deposition of Michael MacKay, which is at issue, contains admissions that reveal Petitioner's extensive business dealings in Illinois. Thus, the sworn deposition directly contradicts the earlier sworn affidavits.

The deposition testimony concerning Petitioner's business dealings in Illinois is corroborated by additional documents and sworn statements which the Attorney General's Office has obtained apart from the New Orleans litigation. Accordingly, the earlier affidavits contain untruths which were intended to defraud the Attorney General's Office and court and lead them to believe Petitioner lacked sufficient involvement in Illinois to be held liable for the clean-up of the hazardous waste.

The Attorney General's Office seeks to reinstate Petitioner as a defendant in the Chicago litigation by exposing the fraud Petitioner has perpetrated on the Attorney General's Office and the court. The conflicting sworn tes-

timony of Michael MacKay is highly probative evidence of that fraud. Petitioner seeks to use the protective order to conceal the evidence of that fraud.

The hazardous waste problem that forms the basis of the Chicago litigation poses a serious threat to the health and safety of the residents of Illinois. The Illinois legislature already has spent $4 million to clean-up this problem. The interests of justice and equity require that Petitioner not be allowed to use the protective order to conceal a fraud which will allow it to escape potential liability for the clean-up of this public hazard.

The Federal Rules of Civil Procedure imply a requirement of good faith dealing in discovery matters. *Campbell v. Eastland,* 307 F.2d 478 (5th Cir. 1962). A party may not use a protective order as a shield to hide evidence of illegal behavior or impair the truth-seeking process. *See, E.E.O.C. v. University of Notre Dame Du Lac,* 715 F.2d 331, 337 (7th Cir. 1983). Petitioner attempts to do just that. Petitioner's only conceivable motive for seeking to retrieve the deposition, is to conceal the fraud that the deposition exposes. Thus, any order by this Court which would disturb the lower court's order allowing the Attorney General's Office to use the deposition would result in a manifest injustice.

Moreover, the decision below turns on the unique facts of this case and will affect few others than the parties. Neither the district court nor the court of appeals believed the case warranted published opinions.

Accordingly, the petition should be denied.

CONCLUSION

For the foregoing reasons Respondent respectfully requests that the petition be denied.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General, State of Illinois

JILL WINE-BANKS
Solicitor General, State of Illinois

160 North LaSalle Street, Suite 800
Chicago, Illinois 60601
(312) 793-7307

Attorneys for Respondent

MICHAEL A. FICARO *
Director of Enforcement

STEVEN F. MOLO
Assistant Attorney General
Of Counsel

* Counsel of Record
(312) 793-7710

APPENDIX A

FIFTH CIRCUIT ORDER FROM WHICH REVIEW IS SOUGHT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 84-3285

NEW ORLEANS SILVERSMITHS, INC.,

Plaintiff

ATTORNEY GENERAL OF THE STATE OF ILLINOIS,

Movant-Appellee,

versus

B. R. MACKAY & SONS, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana

(January 10, 1985)

Before GOLDBERG, POLITZ and WILLIAMS, Circuit Judges.

PER CURIAM: *

We are asked to review the March 28, 1984, order of the district court which *sua sponte* modified that court's order of January 20, 1984, relating to the scope of a protective order. Upon reconsideration, the district court vacated an order of the magistrate, which it had approved, imposing a protective order upon the Attorney General of the State of Illinois respecting the discovery depositions of Michael MacKay and Stephen Bradley. Finding the matter moot, we dismiss the appeal.

B. R. MacKay and Sons, Inc. (MacKay) obtained a protective order in these proceedings on September 28, 1983. That protective order related to certain documents which the plaintiff, New Orleans Silversmiths, Inc., wished to examine in conjunction with the defendant's challenge to the jurisdiction of the district court in the Eastern District of Louisiana. The order related only to the documents subjected to discovery and did not extend to depositions. The depositions of Michael MacKay and Stephen Bradley were taken on October 3, 1983. Sometime in the next month or so, copies of the depositions were furnished to the Illinois Attorney General by counsel for plaintiff.

After learning that the Illinois Attorney General had acquired the depositions, MacKay sought to expand the reach of the protective order to include the depositions. On November 23, 1983, the magistrate extended the protective order. After examining the documents, on January

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

4, 1984, the magistrate granted plaintiff's motion to reconsider the protective order and vacated that order.

On January 6, 1984, the Illinois Attorney General attached portions of MacKay's deposition to a motion filed in an action pending in Illinois state court. On January 11, 1984, MacKay secured an order from the magistrate ordering the Attorney General to, *inter alia*, retrieve all copies of the deposition and return same to the court *a quo* within 72 hours of entry of the order. On January 20, 1984, pursuant to a stipulation of counsel for the parties, in conjunction with settlement of the Silversmiths claims against MacKay, the district court reinstated the protective orders imposed by the magistrate. On March 28, 1984, on its own motion, as noted, the district court modified its order. That order of modification is the subject of this appeal.

When the Illinois Attorney General acquired the two depositions, the depositions were not covered by the extant protective orders. The depositions were lawfully obtained. *See Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949 (8th Cir. 1979). When the Attorney General used portions of the MacKay deposition by attaching same to a motion filed in state court, no protective order was in existence so none could have been violated even if the Attorney General had been a party to the suit and to the order. The subsequently entered order which, as relates to the Illinois Attorney General has been vacated, may not be given retroactive effect. The trial court's *sua sponte* order was correctly entered. The issue is moot. The appeal is dismissed.

APPENDIX B

UNITED STATES DISTRICT COURT OPINION THAT WAS THE BASIS OF APPEAL TO THE FIFTH CIRCUIT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS SILVERSMITHS, INC.,

VS.

B. R. MAC KAY & SONS, et al

Civil Action
No. 83-2482 — SECTION "H"

ORDER AND REASONS

Before the court is a motion to review a February 14, 1984 order of the magistrate, filed on behalf of the attorney general of the state of Illinois, a non-party to this lawsuit. For the reasons discussed below, the motion is DENIED; *sua sponte* the court modifies certain prior orders.

This suit was originally brought by the plaintiff, New Orleans Silversmiths, to collect on accounts allegedly due from the defendant, B.R. MacKay & Sons. That matter was resolved when the parties entered into a settlement

on January 17, 1984. The attorney general of the state of Illinois had previously sought to intervene for the purpose of seeking modification of a protective order which he concluded prevented him from using certain discovery depositions generated in this lawsuit in a civil action filed against MacKay in Illinois. Ruling on the motion to intervene was deferred. For reasons stated hereafter, we deny the motion to intervene.

On September 28, 1983, the magistrate entered a "protective order for confidentiality of documents," under which certain documents to be photocopied by plaintiff would remain "confidential" and would not be used "by any party for any purpose other than this lawsuit." The documents were not to be disseminated "to any nonparty." Record Document No. 23. On November 21, 1983, the magistrate granted a "motion for expansion of protective order," filed on behalf of MacKay, which made the September 28 protective order applicable to the depositions of two officers, Michael MacKay and Steven Bradley. Record Document No. 39. Prior to the entry of this "expanded" order, the Illinois attorney general already had received copies of these depositions from plaintiff's counsel and had filed portions of the depositions into the record of the Illinois proceeding.

On January 11, 1984, the magistrate granted a "request for emergency protective order" filed on behalf of MacKay, and ordered the Illinois attorney general to seal and return all documents arising from discovery in this case and to "recall" any such documents which he had disseminated. In addition, the magistrate ordered that all references to these documents in the Illinois proceeding be stricken. Record Document No. 51. On the same day, the magistrate vacated the original protective order entered on September 28, holding that the documents were "not of a sensitive or privileged nature." Record Document No. 52.

The underlying dispute between the plaintiff and defendant was resolved by a settlement entered into on January 17, 1984, which made reference to a stipulation regarding the protective orders. Record Document No. 53. That stipulation was filed, and an order of this court was entered, on January 20, 1984. Record Document No. 54. The effect of the order and the stipulation to which it refers is to set aside the January 11 "lifting" of the protective orders and to require that all persons possessing any of the referenced documents or depositions return them to the defendant. The Illinois attorney general sought to have the now-reinstated protective orders modified or, in the alternative, to have the January 20 order reconsidered. We are now asked to review the magistrate's denial of that relief.

We first note that the September 28 protective order, and the November 21 "expansion," did not even purport to bind the Illinois attorney general, a non-party. Those orders merely prevented dissemination by the parties to non-parties. As previously noted, the Illinois attorney general was already in possession of the depositions when the order preventing dissemination was entered. The only orders purporting to bind the Illinois attorney general were the January 11 "emergency" order by the magistrate directing him to return all documents and depositions and the January 20 court order, entered as part of the settlement documents, requiring similar action.

Although a district court may order that discovered material remain secret when "good cause" is shown, it is also within the discretion of the district court to modify existing protective orders. We have considered the fact that the parties have agreed to the orders in question. Nevertheless, after a thorough review of the record and the applicable law, we hold that the orders purporting to prohibit the Illinois attorney general from using the depositions lawfully obtained by him should be modified. Fed. R. Civ.P. 26(c).

We respect agreements between parties concerning documents and depositions generated during their litigation. However, parties may not by agreement bind a non-party, such as the Illinois attorney general, and require him to return documents which were lawfully obtained. Neither should an order entered by the magistrate or the judge purport to affect the right of anyone not a party to this litigation to use any document which came into its possession without unlawful conduct on its part. Most assuredly we should not attempt to expunge material from another court's record. The most charitable comment that can be made about that order, for which we accept responsibility, is that it was inadvertent.

We deny the attorney general's pending motion to intervene, because the State of Illinois should not be allowed to inject itself into this private litigation in which it has no real interest to protect. Fed. R. Civ. P. 24(b). However, the attorney general is understandably concerned that his retention or use of the depositions in his possession would be in violation of orders of this court. Because orders entered by the magistrate and this court have generated this concern, the court, *sua sponte*, enters the following:

ORDER

No order previously entered herein affects the right of the attorney general of the State of Illinois to make lawful use of any document or deposition lawfully obtained by him. Previous orders are hereby modified to the extent that they purport to prohibit such use, but such orders remain in full force and effect in all other respects. Pursuant to the March 16, 1984, order, this record remains under seal.

March 28, 1984 /s/ ADRIAN DUPLANTIER
United States District Judge

APPENDIX C

MAGISTRATE'S ORDERS CONCERNING PROTECTIVE ORDERS

EXHIBIT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
New Orleans Division

NEW ORLEANS SILVERSMITHS, INC.,

vs.

B.R. MacKAY & SONS, INC., FILM RECOVERY SYSTEMS CORP. and SPIRIT, INC.,

Civil Action No. 83-2482--Section H
Magistrate "5"

PROTECTIVE ORDER FOR CONFIDENTIALITY OF DOCUMENTS

Considering the Motion of Defendant, B. R. MacKAY & SONS, INC., for a protective order for confidentiality of the documents to be produced at the Request for Production of Documents scheduled for October 3, 1983, previously set for September 29, 1983,

IT IS ORDERED that:

1. *The documents* to be copied by Plaintiff, NEW ORLEANS SILVERSMITHS, INC., are to be treated as confidential documents and shall be copied one time only;

2. The documents copied are to be numbered and returned to Defendant, B. R. MacKAY & SONS, INC., at the conclusion of the above captioned lawsuit;

~~3. Plaintiff shall provide a list of all documents copied to Defendant, B. R. MacKAY & SONS, INC., and shall receipt for all documents received;~~

4. The documents are not to be recopied nor are they to be disseminated to any non-party;

5. The documents are not to be used by any party to this lawsuit for any purposes other than this lawsuit, including, but not limited to, use of any confidential commercial information as to the customers and clients of B. R. MacKAY & SONS, INC.

New Orleans, Louisiana, this 28 day of September, 1983.

/s/ Marcel Livaudais, Jr.
UNITED STATES
DISTRICT JUDGE

Respectfully Submitted:

/s/ William W. Rosen
WILLIAM W. ROSEN, Trial Attorney

/s/ Joyce M. Dombourian
JOYCE M. DOMBOURIAN, Attorney at Law
of LEVY, MARX, LUCAS & ROSEN
722 First National Bank of
Commerce Building
New Orleans, Louisiana 70112
TEL: (504) 523-3300

MINUTE ENTRY
LIVAUDAIS, M.
NOVEMBER 21, 1983

EXHIBIT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS SILVERSMITHS, INC.	CIVIL ACTION
versus	NO. 83-2482
B.R. MacKAY & SONS, INC., ET AL	SECTION: "H" 5

HEARING ON MOTION

PRESENT:

A. D. FREEMAN, Esq.
JOSEPH A. DRAZEK, Esq.
DENNIS PORTER, Esq.
WILLIAM W. ROSEN, Esq.
MS. JOYCE M. DOMBOURIAN

MOTION:

(1) MOTION OF THE PEOPLE OF THE STATE OF ILLINOIS TO INTERVENE
(2) MOTION OF B. R. MACKAY & SONS, INC. FOR EXPANSION OF PROTECTIVE ORDER
(3) MOTION OF B. R. MACKAY & SONS, INC., TO HOLD PLAINTIFF IN CONTEMPT
(4) MOTION OF B. R. MACKAY & SONS, INC., FOR SANCTIONS

1,2,3,4 OPPOSITION __ NO OPPOSITION

ORDERED

1 Ruling deferred. Mover to re-notice for hearing after determination of status of re-opening of Illinois suit.

2 GRANTED. Protective Order to apply to October 3, 1983 depositions of Michael Mackay and Stephen Bradley.

3,4 DENIED.

/s/ Marcel Livaudais, Jr.
MARCEL LIVAUDAIS, JR.
United States Magistrate

FILED
Nov. 23, 1983
CLERK TO NOTIFY ALL COUNSEL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
New Orleans Division

NEW ORLEANS SILVERSMITHS, INC.

vs.

B. R. MacKAY & SONS, INC., FILM RECOVERY SYSTEMS CORP. and SPIRIT, INC.

Civil Action No. 83-2482
Section H, Magistrate "5"

ORDER

The Request for Emergency Protective Order being considered, and upon its being represented that the Attorney General of the State of Illinois did attach to a brief filed on January 6, 1984, in a Cook County, Illinois proceeding, No. 83-CH-3812, entitled "People of the State of Illinois v. Film Recovery Systems Corporation, et al.", copies of a 30(b)(6) deposition of B. R. MacKAY & SONS, INC. by Michael MacKay taken in this proceeding before this Court which was under protective order of this Court, and, upon a finding that the Attorney General of the State of Illinois did make an appearance before this Court for the purpose of intervening in this proceeding and is, therefore, subject to this Court's jurisdiction,

IT IS ORDERED that:

1. The Attorney General of the State of Illinois seal and forward to this Court all copies of depositions and documents developed or taken in discovery proceedings in connection with the above-styled proceeding which are under protective order of this Court;

2. The Attorney General of the State of Illinois recall all copies of the said deposition and documents disseminated by the Attorney General to any source, including any copies filed in the aforesaid or any other court proceedings, and for any reason, and to seal and forward forthwith to this Court all such depositions, documents and copies thereof;

3. The Attorney General of the State of Illinois direct registered or hand-delivered letters to each party to whom the said discovery was disseminated, by brief or otherwise, acknowledging the discovery was sent in violation of protective order of this Court, that no further copying of that discovery should be made, and that all copies of the said discovery are to be sealed and returned to the Attorney General of the State of Illinois for forwarding to this Court;

4. All portions of pleadings and memoranda filed in the Chicago proceeding which make any reference to the depositions or discovery developed in the Louisiana proceeding be stricken;

5. That the Attorney General of the State of Illinois complete all of the above within seventy-two (72) hours of the date of this Order pending further sanctions and orders of this Court.

New Orleans, Louisiana, this 11th day of January, 1984.

/s/ MARCEL LIVAUDAIS, JR.
United States Magistrate

MINUTE ENTRY
LIVAUDAIS, M.
JANUARY 4, 1984

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS SILVERSMITHS, INC. — CIVIL ACTION

versus — NO. 83-2482

B.R. MacKAY & SONS, INC. — SECTION: H (5)

HEARING ON MOTION

PRESENT:

A.D. FREEMAN, ESQ.
WILLIAM ROSEN, ESQ.
MS. JOYCE DOMBOURIAN

MOTION:

(1) OF PLAINTIFF TO RECONSIDER THE PROTECTIVE ORDER FOR CONFIDENTIALITY OF DOCUMENTS.

1 OPPOSITION __ NO OPPOSITION

ORDERED

1 GRANTED. SEPTEMBER 28, 1983 PROTECTIVE ORDER VACATED, SUBJECT TO RIGHT OF DEFENDANT TO APPEAL. DOCUMENTS PREVIOUSLY REVIEWED *IN CAMERA* ARE *NOT OF A SENSITIVE OR PRIVILEGED NATURE.*

/s/ Marcel Livaudais, Jr.
MARCEL LIVAUDAIS, JR.
United States Magistrate

FILED
JAN 11, 1984

MINUTE ENTRY
LIVAUDAIS, M.
JANUARY 27, 1984

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS SILVERSMITHS, INC.	CIVIL ACTION
versus	NO. 83-2482
B.R. MacKAY & SONS, INC., ET AL	SECTION: H (5)

HEARING ON MOTION

PRESENT:

WILLIAM W. ROSEN, ESQ.	STEVEN F. MOLO, ESQ.
MS. JOYCE M. DOMBOURIAN	MS. PATRICIA N. BOWERS
MORTON DENLOW, ESQ.	MICHAEL A. FICARO, ESQ.
	MS. LISA KEEGAN

MOTION:

(1) OF B. R. MacKAY & SONS, INC., FOR AN EXPEDITED HEARING.
(2) OF B.R. MacKAY & SONS, INC., FOR CONTEMPT & SANCTIONS.
(3) OF STATE OF ILLINOIS TO MODIFY PROTECTIVE ORDER OR ALTERNATIVELY TO RECONSIDER.
(4) OF ATTORNEY GENERAL OF LOUISIANA TO PERMIT VISITING ATTORNEY, STEVEN F. MOLO, TO PARTICIPATE.

1,4 OPPOSITION 2,3 NO OPPOSITION

ORDERED

1,4	GRANTED.
2	DENIED.
3	DENIED. (RECORD DOCUMENT 54).

/s/ Marcel Livaudais, Jr.
MARCEL LIVAUDAIS, JR.
United States Magistrate

FILED
FEB 10, 1984

APPENDIX D

ATTORNEY GENERAL'S MOTION FOR REVIEW OF MAGISTRATE'S ORDER, TO WHICH THE DEPOSITION OF MICHAEL T. MACKAY IS ATTACHED AS EXHIBIT 4.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
New Orleans Division

NEW ORLEANS SILVERSMITHS, INC.,

Plaintiff,

vs.

B.R. MacKAY & SONS, INC., FILM RECOVERY SYSTEMS CORP. and SPIRIT, INC.,

Defendants.

Civil Action No. 83-2482—Section H
Judge Adrian Duplantier, Magistrate "5"

[DISTRICT COURT
DOCKET SHEET NO. 66
FILED FEBRUARY 27, 1984]

MOTION FOR REVIEW OF MAGISTRATE'S ORDER

NOW COME the People of the State of Illinois, NEIL F. HARTIGAN, Attorney General of the State of Illinois, through the assistance of counsel of the Honorable William Guste, Attorney General of the State of Louisiana, and pursuant to local rule 20.11, hereby request that this Court review and reverse the order of Magistrate entered

February 14, 1984 wherein the Magistrate denied the Attorney General's request to use documents under a protective order in this suit in another lawsuit pending in Chicago, Illinois. In support thereof, the Attorney General states:

1. On January 27, 1984 the Attorney General of Illinois, as a non-party to this lawsuit, requested that the Honorable Marcel Livaudais modify a protective order in this case which precludes the dissemination of discovery documents to persons other than parties to this lawsuit. The Attorney General sought leave of court to use the 30(b)(6) deposition of Michael T. MacKay, taken in this action, as evidence in a hazardous waste lawsuit pending in Cook County Circuit Court in Chicago, Illinois. The deposition was subject to an agreed protective order of the parties. However, the Attorney General had obtained and disseminated, the deposition *prior* to the entry of the protective order.

2. On February 14, 1984 the Honorable Marcel Livaudias denied said motion of the Attorney General. (Exhibit 1). The Magistrate erred in denying the Attorney General's Motion to Modify the Protective Order for the limited purpose of using the deposition as evidence in the hazardous waste litigation in Cook County Circuit Court.

Procedural Background

3. This underlying case before this Court is a commercial dispute between New Orleans Silversmiths and B.R. MacKay & Sons (BRM), a corporation headquartered in Utah and engaged in the silver recovery business and Film Recovery Systems, Inc., a corporation engaged in the silver recovery business in Elk Grove Village, Illinois. This suit was ongoing in the spring of 1983.

4. The Chicago case is a lawsuit concerning civil liability for the clean-up of hazardous waste in the form of 16 million pounds of cyanide-coated film chips generated by Film Recovery Systems and BRM and illegally stored at ten different locations in northern Illinois. In May of 1983, the Attorney General of Illinois sued several defendants in an effort to clean-up the hazardous waste and protect the people of Illinois. The case is captioned *People v. Film Recovery Systems*, Cook County Circuit Court No. 83-CH-3812.

5. BRM moved to dismiss the Chicago lawsuit because it claimed that it lacked sufficient contacts with Illinois to be subject to Illinois jurisdiction. In support of its motion, BRM filed sworn affidavits of Michael T. MacKay, President of BRM, stating in substance that BRM did not conduct business in Illinois.

6. Based on the aforesaid sworn affidavits and assurances by BRM that they were truthful and that BRM in fact did not conduct business in Illinois, the Attorney General agreed to the dismissal of BRM from the suit. BRM agreed to loan $90,000 to another defendant, Film Recovery Systems, to be paid to a trust fund for the clean-up of the cyanide contaminated film chips.

7. The hazardous waste problem at the abandon silver recovery plant gained national notoriety. A Polish immigrant worker at the plant died from exposure to cyanide during the silver recovery process. The Cook County State's Attorney (the District Attorney/criminal prosecutor for the greater Chicago area), indicted several managers of the plant for homicide in connection with the death of the immigrant worker. The Attorney General is not involved in the criminal homicide prosecution. The Attorney General is concerned solely with the *civil liability* for the illegal generation, transportation and storage of the hazardous waste.

8. On August 12, 1983, prior to the entry of any protective order in this case, the Illinois Attorney General received an unsolicited phone call from A.D. Freeman, counsel for New Orleans Silversmiths in this suit, informing the Attorney General of this litigation. Further, Freeman provided the Attorney General with copies of the pleadings filed in this action. Those pleadings were sent to the Attorney General in Chicago on August 18, 1983.

9. Based on the information obtained from Freeman and information from other sources, the Attorney General determined that BRM had in fact conducted business in Illinois. Accordingly, the Attorney General petitioned the Cook County Circuit Court to reopen the action against BRM.

10. On September 28, 1983, the Magistrate entered a protective order which provided for the nondisclosure of *documents* produced by BRM in this case. The documents subject to the protective order were subsequently found not to be of a sensitive or privileged nature in the Magistrate's January 17, 1984 court order.

11. On October 3, 1983, Plaintiff's counsel, A.D. Freeman, deposed Michael T. MacKay, President of BRM, pursuant to FRCP 30(b)(6). In that deposition, Michael T. MacKay stated under oath, that BRM was involved in the processing of scrap film in the Chicago area and responsible for the business activities at the location at which the cyanide film chips were generated. Thus, the statements of Michael T. MacKay in his sworn deposition, directly contradict the statements of Michael T. MacKay in his sworn affidavit filed in Cook County Circuit Court.

12. On October 31, 1983, the Attorney General received a copy of the transcript of the aforesaid sworn deposition testimony of Michael T. MacKay from A.D. Freeman.

The transcript of the deposition was not subject to the protective order by this Court at that time.

13. During the first week of November, 1983, the Attorney General disseminated the transcripts of Michael T. MacKay's deposition to the Cook County State's Attorney and Tyrone C. Fahner, the trustee in bankruptcy for Film Recovery Systems, the corporation which had been doing business at the now abandoned silver recovery plant in suburban Chicago.

14. On November 21, 1983, the Attorney General of Illinois moved to intervene in the proceeding before this Court involving New Orleans Silversmiths and BRM. The Attorney General sought to intervene for the limited purpose of modifying the Protective Order covering the documents. The Attorney General sought to use some of those documents in an attempt to reinstate BRM as a defendant in the civil lawsuit in Cook County Circuit Court.

15. On November 23, 1983, the Magistrate deferred ruling on the Attorney General's petition to intervene pending a determination by the Cook County Circuit Court on whether BRM would be reinstated as a defendant in the civil lawsuit in Cook County. Further, on November 23, 1983, the court ordered that the protective order be expanded to include the October 3, 1983 deposition of Michael MacKay which was already in the possession of and disseminated by the Attorney General.

16. On January 6, 1983, the Attorney General filed with the Cook County Circuit Court a supplemental petition to reinstate BRM as a defendant. The supplemental petition alleged facts in addition to those set forth in the Attorney General's initial petition. All the allegations of the supplemental petition further demonstrate that BRM did conduct business in Illinois and was responsible for the illegal generation, transportation and storage of the haz-

ardous waste at issue. Included in the supplemental petition are portions of the transcript of the deposition of Michael T. MacKay taken during the course of this action. The Attorney General had obtained the deposition transcript prior to the entry of any protective order barring the parties from disseminating the deposition transcript. Further, the transcript directly contradicts the earlier sworn statement of Michael T. MacKay that BRM did not do business in Illinois. The portions of the deposition used contain no BRM business secrets or privileged material. Accordingly, the Attorney General made it part of the supplemental petition. The Attorney General attached the portions of the deposition of Michael T. MacKay in the good faith belief that the protective order did not prohibit him from doing so because: the Attorney General obtained the deposition prior to the entry of the expanded protective order; the Attorney General disseminated the deposition to the trustee in bankruptcy and the Cook County State's Attorney prior to the entry of the expanded protective order; and the protective order only barred dissemination of the documents by the parties to the New Orleans suit and although the Attorney General sought to intervene in that suit, leave was not granted and he was not a party and is not now a party.

17. On January 11, 1984, BRM sought an emergency protective order from the Magistrate, alleging that the Attorney General violated the protective order by attaching copies of portions of the deposition of Michael T. MacKay to the supplemental petition filed in the Cook County Circuit Court on January 6, 1984. On January 11, 1984, the Magistrate ordered that the Attorney General retrieve the documents filed in the Cook County Circuit Court and disseminated to the parties in that action, and return them to the Magistrate.

18. Further, on January 11, 1984, the Magistrate vacated the protective order on the motion of the plaintiff, New Orleans Silversmith's, subject to the right of the defendant to appeal. The Magistrate based his order on his review of the documents and finding that they were "not of a sensitive or privileged nature". (Exhibit 2).

19. On January 17, 1984, New Orleans Silversmiths and BRM agreed to settle and dismiss this case, the New Orleans lawsuit.

20. As a condition of the settlement, the parties agreed between themselves, to reinstate the protective order. The Magistrate reinstated the protective order on January 20, 1984.

21. On January 27, 1984, the Attorney General moved to modify the protective order, or in the alternative, for reconsideration of the Magistrate's January 20, 1984 order reinstating the protective order. The Attorney General sought to modify the protective order for the limited purpose of using the portions of the Michael T. MacKay deposition which contradict his earlier affidavits in the Cook County Circuit Court proceeding. The Attorney General sought to use the depositions to expose the fraud perpetrated on the Cook County Circuit Court by BRM and to reinstate BRM as a defendant in the Chicago lawsuit.

22. Further, on January 27, 1984, BRM sought sanctions and a contempt citation against the Attorney General for filing the portions of Michael T. MacKay's deposition with the Cook County Circuit Court.

23. On February 14, 1984, the Magistrate denied BRM's motion for sanctions and a contempt citation. Further, the Magistrate denied the Attorney General's motion to modify the protective order to allow the Attorney General to use the deposition of Michael T. MacKay, which the Attorney General had prior to the entry of the

protective order, to expose the fraud perpetrated by Michael T. MacKay on the Cook County Circuit Court. The Attorney General now seeks review of that portion of the Magistrate's order which denied the request to modify the protective order.

The Magistrate Erred In Refusing To Allow The Attorney General To Use The Deposition Of Michael T. MacKay In The Suit Pending Before The Cook County Circuit Court.

24. The Attorney General received the deposition of Michael T. MacKay on October 31, 1983. At the time the Attorney General received the deposition, it was not under a protective order. During the first week in November, 1983, the Attorney General disseminated the deposition to the Cook County State's Attorney and the trustee in bankruptcy for Film Recovery Systems. The protective order was not expanded to bar the parties from disseminating depositions until November 23, 1983. The Attorney General was not a party to the New Orleans lawsuit at the time the protective order was expanded and is not now a party. Thus, the Attorney General is not bound by the protective order in that the order bars only parties from disseminating discovery and the Attorney General has never been a party to the lawsuit. Further, the Attorney General is not bound by the protective order in that he received and disseminated the deposition of Michael T. MacKay prior to the entry of the expanded protective order. Accordingly, the Attorney General acted properly in using the deposition of Michael T. MacKay in the Chicago lawsuit on January 6, 1984.

25. BRM has made no showing, as required by FRCP 26(c), that justice requires the imposition of a protective order "to protect a party or person from annoyance, em-

barrassment, oppression or undue burden or expense." FRCP 26(c).

26. Pre-trial discovery must take place in public unless compelling reasons exist for denying the public access to the proceedings. No reasons exist for denying public access to discovery proceedings and documents in this case.

27. Use of the deposition of Michael T. MacKay in the Chicago lawsuit would expedite resolution of the issues in the Chicago lawsuit and allow the Attorney General to best protect the health and safety of the people of Illinois exposed to the dangerous hazardous waste.

28. B. R. MacKay & Sons (BRM) has sought this protective order in bad faith and for the purpose of concealing a fraud perpetrated on the Cook County Circuit Court in the Chicago lawsuit, to-wit:

a. The Chicago lawsuit involves a dispute over civil liability for the clean-up of hazardous waste caused by the unlawful generation, transportation and storage of cyanide film chips in the Chicago area.

b. Defendant B. R. MacKay & Sons (BRM) was named as a defendant in the Chicago suit but sought dismissal based on lack of sufficient contacts with Illinois to confer personal jurisdiction. B. R. MacKay & Sons filed with the Cook County Circuit Court, sworn affidavits of Michael T. MacKay, President of BRM, stating in substance, that BRM did not conduct business in Illinois. Specifically, the affidavits state:

—that BRM "has no employees within the State of Illinois."

—that BRM "has not sold or distributed products or services in Illinois."

—that "at no time has BRM engaged in the business of processing scrap film for the recovery of silver in Illinois."

—that "at no time has BRM stored the x-ray film chips resulting from such process in Illinois."
—that Michael MacKay at no time "engaged in the business of recovering silver from scrap film in Illinois."

See, Exhibit 3.

c. Based on the aforesaid sworn affidavits and assurances by BRM that they were truthful and that BRM in fact did not conduct business in Illinois, the Attorney General agreed to the dismissal of BRM from the suit.

d. The sworn deposition testimony of Michael T. MacKay, taken in the New Orleans lawsuit and subject to the protective order, directly contradicts the affidavits of Michael T. MacKay filed in the Chicago lawsuit. The deposition testimony states in substance, that BRM conducted business in Illinois. Specifically, the deposition states:
—that BRM was involved in the processing of scrap film in Illinois. dep. p. 22, 23.
—that BRM paid for the rent of the property on which Film Recovery Systems, the abandoned Chicago silver recovery plant, operated. dep. p. 51, 52.
—that BRM Film Division purchased scrap film in Chicago. dep. p. 55, 57.
—that BRM paid the salaries of Film Recovery Systems employees. dep. p. 61, 76.
—that Film Recovery Systems employees were authorized to draw on money deposited by BRM in an account with the Utah bank and that account was funded generally by BRM. dep. p. 53, 54.
—that the Comptroller of BRM exercised control over the expenditures of Film Recovery Systems. dep. p. 54.

See, Exhibit 4.

e. Thus, accepting the sworn deposition testimony of Michael T. MacKay as true, BRM through the affidavits of Michael T. MacKay filed in the Chicago lawsuit, has attempted to defraud the Cook County Circuit Court and the Attorney General by representing that BRM did not do business in Illinois.

29. The above-described deposition testimony of Michael T. MacKay which the Attorney General has filed with the Cook County Circuit Court, is nonprivileged and contains no trade secrets or sensitive business information.

30. Absent a showing pursuant to FRCP 26(c) of the need for nondisclosure of the deposition transcript, BRM's opposition to the Attorney General's use of the deposition constitutes an obstruction of the judicial process with respect to the pending action in the Cook County Circuit Court and a furtherance of the fraud already perpetrated on that court by BRM and Michael T. MacKay.

WHEREFORE, the Attorney General respectfully request that this Court review the order of the Magistrate and:

1. Determine whether the Attorney General is bound by the protective order notwithstanding that the Attorney General is not a party, and that the Attorney General received and disseminated the deposition of Michael T. MacKay prior to the entry of the protective order;

2. Reverse the decision of the Magistrate and allow the Attorney General to use the nonprivileged, nonsensitive portions of the deposition of Michael T. MacKay in the lawsuit pending in the Cook County Circuit Court, Chicago, Illinois.

Respectfully submitted,
NEIL F. HARTIGAN
Attorney General of the
State of Illinois

By: _____
MICHAEL A. FICARO
Assistant Attorney General

NEIL F. HARTIGAN
Attorney General of Illinois
MICHAEL A. FICARO
DENNIS PORTER
STEVEN F. MOLO
JOSEPH DRAZEK
Assistant Attorneys General
160 North LaSalle Street - Room 900
Chicago, Illinois 60601
(312) 793-7710/793-7307

WILLIAM J. GUSTE, JR.
Attorney General of the
State of Louisiana

By: _____
PATRICIA NALLY BOWERS
Assistant Attorney General

WILLIAM J. GUSTE, JR.
Attorney General of Louisiana
PATRICIA NALLY BOWERS
Assistant Attorney General
234 Loyola Avenue - 7th Floor
New Orleans, Louisiana
(504) 568-5575

EXHIBIT 1

MINUTE ENTRY
LIVAUDAIS, M.
JANUARY 27, 1984

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS SILVERSMITHS, INC.	CIVIL ACTION
versus	NO. 83-2482
B.R. MacKAY & SONS, INC., ET AL	SECTION: H (5)

HEARING ON MOTION

PRESENT:

WILLIAM W. ROSEN, ESQ.	STEVEN F. MOLO, ESQ.
MS. JOYCE M. DOMBOURIAN	MS. PATRICIA N. BOWERS
MORTON DENLOW, ESQ.	MICHAEL A. FICARO, ESQ.
	MS. LISA KEEGAN

MOTION:

(1) OF B. R. MacKAY & SONS, INC., FOR AN EXPEDITED HEARING.
(2) OF B.R. MacKAY & SONS, INC., FOR CONTEMPT & SANCTIONS.
(3) OF STATE OF ILLINOIS TO MODIFY PROTECTIVE ORDER OR ALTERNATIVELY TO RECONSIDER.
(4) OF ATTORNEY GENERAL OF LOUISIANA TO PERMIT VISITING ATTORNEY, STEVEN F. MOLO, TO PARTICIPATE.

1,4 OPPOSITION 2,3 NO OPPOSITION

ORDERED

1,4	GRANTED.
2	DENIED.
3	DENIED. (RECORD DOCUMENT 54).

/s/ Marcel Livaudais, Jr.
MARCEL LIVAUDAIS, JR.
United States Magistrate

FILED
FEB 10, 1984

EXHIBIT 2

MINUTE ENTRY
LIVAUDAIS, M.
JANUARY 4, 1984

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS SILVERSMITHS, INC.	CIVIL ACTION
versus	NO. 83-2482
B.R. MacKAY & SONS, INC.	SECTION: H (5)

HEARING ON MOTION

PRESENT:

A.D. FREEMAN, ESQ.
WILLIAM ROSEN, ESQ.
MS. JOYCE DOMBOURIAN

MOTION:

(1) OF PLAINTIFF TO RECONSIDER THE PROTECTIVE ORDER FOR CONFIDENTIALITY OF DOCUMENTS.

1 OPPOSITION __ NO OPPOSITION

ORDERED

1 GRANTED. SEPTEMBER 28, 1983 PROTECTIVE ORDER VACATED, SUBJECT TO RIGHT OF DEFENDANT TO APPEAL. DOCUMENTS PREVIOUSLY REVIEWED *IN CAMERA* ARE NOT OF A SENSITIVE OR PRIVILEGED NATURE.

/s/ Marcel Livaudais, Jr.
MARCEL LIVAUDAIS, JR.
United States Magistrate

FILED
JAN 11, 1984

EXHIBIT 3

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT—CHANCERY DIVISION

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

No. 83 CH 3812 vs.

FILM RECOVERY SYSTEMS CORPORATION, a Delaware Corporation, METALLIC MARKETING SYSTEMS CORPORATION, a Delaware Corporation, et al.,

Defendants.

AFFIDAVIT

STATE OF UTAH
COUNTY OF SALT LAKE—ss.

MICHAEL T. MACKAY, being first duly sworn, on oath, deposes and states as follows:

1. I have personal knowledge of all of the matters contained in this affidavit and would be competent to testify thereto if called as a witness.

2. I am, and at all times relevant to this litigation have been, a resident of Sandy, Utah. I have been a resident of the Salt Lake City, Utah area since my birth in 1940.

3. I own no real estate and maintain no residence or office within the State of Illinois.

4. I maintain no accounts with any bank, savings institution or similar corporations in the State of Illinois.

5. I own no personal property in the State of Illinois.

6. I do not maintain any mailing address or telephone number in the State of Illinois, nor am I listed in any Illinois telephone directory.

7. I hold no license issued by the State of Illinois or any of its governmental units.

8. At no time did I ever maintain any ownership interest in Film Recovery Systems Corporation ("FRS").

9. I have never appointed an agent for service of process within the State of Illinois.

10. I was elected a Director and Vice President of FRS in late 1979. I resigned as a Vice-President and Director of FRS on December 14, 1982. (A true and correct copy of my letter of resignation is attached hereto as Exhibit A). My only contacts with the State of Illinois have been as a corporate officer and director of FRS or other corporations and not in any individual capacity.

11. At no time did I ever receive a salary or other compensation from FRS. I was never involved in the active management of FRS and I never maintained an office at FRS. I did come to Illinois on several occasions in my capacity as a director and officer of FRS.

12. At no time have I engaged in the business of recovering silver from scrap film in Illinois.

13. At no time have I transported scrap film in Illinois.

14. At no time have I stored scrap film in Illinois.

15. At no time have I entered into any contract with any of the trucking companies or warehouses listed in the foregoing complaint, namely: Gemini Leasing Company, Livco, Inc., Eagle Trailers, Inc., Trailers Unlimited, Inc., J's Mobile Semi-Trailer Repair, Inc., HBE Trailer Corporation, American Interstate Freight Lines, Inc., Aldens, Inc., J. Fiorito Leasing Company, Red Devil Manufacturing, Inc., Flexi-Van Leasing, Inc., Andraniak Applian d/b/a General Diesel, First Industrial Corporation, Waldco Corporation and Donald Jacks.

16. At no time did I have any involvement in the decisions to store any of the film chips referred to in plain-

tiff's complaint nor was I at any time aware that said film chips contained a cyanide residue.

17. At no time did I exercise any control or in any way direct the operation of the film processing which took place at the premises of FRS and I was at all times assured that such processing was nonhazardous, that any cyanide or other potentially dangerous products were neutralized in the process and that all permits necessary for the handling of the cyanide had been obtained. I was informed that the cyanide process was a secret one developed by Steven O'Neil but I never learned any of the details of the process.

18. I have never been served with Summons and Complaint in this action.

19. Further affiant sayeth naught.

DATED this 18 day of May, 1983.

/s/ Michael T. MacKay
MICHAEL T. MACKAY

SUBSCRIBED AND SWORN TO before me this 18th day of May, 1983.

/s/ [Illegible]
Notary Public
Residing at Salt Lake City, Utah

My Commission Expires:
May 20, 1984

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT—CHANCERY DIVISION

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

No. 83 CH 3812 vs.

FILM RECOVERY SYSTEMS CORPORATION, a Delaware Corporation, METALLIC MARKETING SYSTEMS CORPORATION, a Delaware Corporation, et al.,

Defendants.

AFFIDAVIT

STATE OF UTAH
COUNTY OF SALT LAKE—ss.

MICHAEL T. MACKAY, being first duly sworn, on oath, deposes and states as follows:

1. I have personal knowledge of all of the matters contained in this affidavit and would be competent to testify thereto if called as a witness.

2. I am, and at all times relevant to this litigation have been, the President of B. R. MacKay & Sons, Inc. ("BRM"), a Utah corporation with its principal place of business in Salt Lake City. On or about January 23, 1980, BRM Purchased 17,500 shares of the common stock of Film Recovery Systems Inc. ("FRS") for $275,000, which constituted the initial capital of FRS. Since 1980, BRM has been a customer of FRS, has purchased silver bearing material from FRS and is now a creditor of FRS.

3. BRM owns no real estate and has no employees within the State of Illinois.

4. BRM maintains no accounts with any bank, savings institution or similar corporations in the State of Illinois.

5. BRM owns no personal property in the State of Illinois.

6. During January and February, 1983, BRM maintained a mailing address and a telephone number in the State of Illinois, but was never listed in any Illinois telephone directory. BRM does not advertise in Illinois and has not sold or distributed products or services in Illinois.

7. BRM holds no license issued by the State of Illinois or any of its governmental units.

8. BRM has never appointed an agent for service of process within the State of Illinois.

9. On or about March 8, 1983, BRM liquidated its stock interest in FRS and since that time has had no ownership interest in FRS.

10. At no time did BRM have any involvement in the decision to store any of the film chips referred to in plaintiff's complaint nor was it at any time aware that said film chips contained a cyanide residue.

11. At no time did BRM exercise any control or in any way direct the operation of the film processing which took place at the premises of FRS and was at all times assured that such processing was nonhazardous, that any cyanide or other potentially dangerous products were neutralized in the process and that all permits necessary for the handling of the cyanide had been obtained. BRM was informed that the cyanide process was a secret one developed by Steven O'Neil but never learned any of the details of the process.

12. At no time has BRM engaged in the business of processing scrap film for the recovery of silver in Illinois.

13. At no time has BRM stored the x-ray film chips resulting from such process in Illinois.

14. At no time has BRM entered into any contract with any of the trucking companies or warehouses listed in the foregoing complaint, namely: Gemini Leasing Company, Livco, Inc., Eagle Trailers, Inc., Trailers Unlimited, Inc., J's Mobile Semi-Trailer Repair, Inc., HBE Trailer Corporation, American Interstate Freight Lines, Inc., Aldens, Inc., J. Fiorito Leasing Company, Red Devil Manufacturing, Inc., Flexi-Van Leasing, Inc., Andraniak Applian d/b/a General Diesel, First Industrial Corporation, Waldco Corporation and Donald Jacks.

15. BRM has never been served with Summons and Complaint in this action.

16. Further affiant sayeth naught.

DATED this 18 day of May, 1983.

/s/ Michael T. MacKay
MICHAEL T. MACKAY

SUBSCRIBED AND SWORN TO before me this 18th day of May, 1983.

/s/ [Illegible]
Notary Public
Residing at Salt Lake City, Utah

My Commission Expires:
May 20, 1984

EXHIBIT 4

[1]* UNITED STATES DISTRICT COURT
EASTERN DIVISION OF LOUISIANA
Civil Action No. 83-2482

NEW ORLEANS SILVERSMITHS, INC.,

Plaintiffs,

vs.

B. R. MACKAY AND SONS, INC., FILM RECOVERY SYSTEMS CORP., and SPIRIT, INC.,

Defendants.

Deposition of: MICHAEL MacKAY

BE IT REMEMBERED that on the 3rd day of October, 1983, the deposition of MICHAEL MacKAY, produced as a witness herein, at the instance of the Plaintiff herein, in the above-entitled action now pending in the above-named court, was taken before Joanne Pratt, a Certified Shorthand Reporter and Notary Public in and for the State of Utah, commencing at the hour of 10:55 A.M. of said day at the offices of B. R. MacKay & Sons, Inc., 1520 Pioneer Road, Salt Lake City, State of Utah.

That said deposition was taken pursuant to Notice.

* * *

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* Numbers in brackets refer to the pagination of the Certified Shorthand Reporter's transcript of proceedings.

[2] APPEARANCES

For the Plaintiff:

A. D. FREEMAN
Attorney at Law
SATTERLEE, MESTAYER & FREEMAN
1606 FNBC Building
New Orleans, Louisiana 70112

For the Defendant,
West Coast Spirit & Shureway, Inc.:

STEVEN R. ELLINWOOD
Attorney at Law
GREENE, CALLISTER & NEBEKER
800 Kennecott Building
Salt Lake City, Utah 84111

For the Defendant,
B. R. MacKay & Sons, Inc.:

JOHN M. BRADLEY and
GORDON STRACHAN
Attorneys at Law
PRINCE, YEATES & GELDZAHLER
424 East Fifth South
Third Floor Mony Plaza
Salt Lake City, Utah 84111

Also Present:

PAUL J. LEAMAN, JR.
New Orleans Silversmiths

STEVEN BRADLEY

* * *

[3] PROCEEDINGS

MR. FREEMAN: This is the Plaintiff's 30 (b)(6) deposition of B. R. MacKay & Sons, Inc. I'm A. D. Freeman, Attorney for the Plaintiff. I would like to ask now who will answer for B. R. MacKay & Sons, Inc. with respect to the 11 areas of inquiry?

MR. STRACHAN: Before we get to the deposition, let's establish some of the things that we've done before. Documents were produced this morning pursuant to the Protective Order, and we request a copy to be attached to the deposition.

Second, it is taken pursuant to the Rules. All objections other than as to form are reserved.

MR. FREEMAN: That's right. The witnesses have a right to the—the witness who answers for B. R. MacKay & Sons, Inc. has a right to read and sign the deposition. The deposition, the original and one, depending on whether it requires a signature or not, is to be sent to me since our Federal Court does not accept the filing of discovery documents any more. I don't know whether your Federal Court follows that same rule or not.

MR. STRACHAN: Only the cover sheet.

MR. FREEMAN: Our Federal Court takes nothing. We retail all original discovery documents.

So who will answer?

[4] MR. STRACHAN: Mr. Mike MacKay.

MICHAEL TAYLOR MacKAY, called as a witness by and on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

Examination by Mr. Freeman

Q. Mr. MacKay, you have now been sworn, and you are the witness who is going to answer for B. R. MacKay & Sons, Inc. in the 30(b)(6) deposition; is that correct?

A. Yes.

Q. What's your full name and residence address?

A. Michael Taylor MacKay. 8010 Royal Lane, Sandy, Utah.

Q. How old are you?

A. 43.

Q. What is your position with B. R. MacKay & Sons, Inc. presently?

A. I'm president of B. R. MacKay & Sons, Inc.

Q. How long have you been president?

A. Since probably 19—maybe '76 or '77, in that area. I don't recall the exact date right now.

(Whereupon, an off-the-record discussion was had.)

(Whereupon, the last answer was read back.)

Q. (By Mr. Freeman) B. R. MacKay & Sons, Inc. is a Utah corporation, is it?

[5] A. Yes.

Q. How long has it been incorporated?

A. I believe B. R. MacKay & Sons was incorporated in 1962, I believe; '62 or '64. I don't recall.

Q. What is its business?

A. Secondary silver refining.

Q. What is secondary silver refining?

A. It's refining of silver recovered from industrial processes.

Q. What does silver refining mean? What do you do with it to refine it?

A. The silver is recovered as a byproduct through industrial processes; generally it's not pure. We take that impure silver rod and refine it to a commercially pure standard.

Q. You make it into pure silver bars; is that right?

A. Yes.

Q. Relatively pure?

A. Yes.

Q. What is B. R. MacKay & Sons, Inc. Film Division?

A. B. R. MacKay & Sons, Inc. Film Division does not exist at the present time.

Q. Well, did it exist at other times?

A. Yes.

Q. Tell me what it was and when it existed.

[6] A. B. R. MacKay & Sons, Inc. Film Division existed in January, and February of 1983 and it was a division of B. R. MacKay & Sons.

Q. Well, when was it created?

A. January of 1983.

Q. Why was it created?

A. To purchase scrap film.

Q. Was it authorized by resolution of the board?

A. No.

Q. Who decided to create the Film Division?

A. Management committee of B. R. MacKay & Sons.

Q. Who was the management committee?

A. Myself, Steven Bradley and Fred Haynie.

Q. Fred what?

A. Haynie.

Q. Is Mr. Haynie the controller?

A. Yes.

Q. Were those gentlemen created, the management committee, by resolution of the board?

A. Excuse me?

Q. I said, was there a resolution of the board appointing those gentlemen as the management committee?

A. I don't believe so.

Q. How did they get to be the management committee?

A. I assigned them that.

[7] Q. In your capacity as president?

A. yes.

Q. Who is on the board?

A. Myself, my father, my mother.

Q. What are their names?

A. Byron R. MacKay and Ethel T. MacKay.

Q. What did this management committee do to create Film Division?

A. What did the committee do to create the Film Division?

Q. Yes.

A. Well, it decided, I suppose, the objectives of the Film Division and set up the mechanism for it to operate.

Q. What were the objectives?

A. A 30-day experiment in the purchasing of scrap film; short-term experiment originally intended to go for the month of January.

Q. That was the objective?

A. Yes.

Q. What was the mechanics?

A. BRM Film Division appointed FRS as its—as an agent to purchase film for it. FRS would purchase the scrap film, notify BRM Film Division as to the amount of film and the terms and conditions, and then notify the Film Division when the material was received in FRS Elk Grove Village processing facility.

[8] Film Division would then, according to the terms of purchase, issue payment to the customers from whom the scrap film was purchased.

Q. Just to save time, FRS is Film Recovery Systems Corporation, one of the Defendants in this case, right?

A. Yes.

Q. And you say in January, January '83, you, the management committee, appointed it as your agent to buy film; is that right?

A. Yes. It could have been late December. It became operational after January of '83.

Q. Was that appointment of that agent in writing?

A. No.

Q. Who were you dealing with as individuals when you appointed this corporation as your agent in January of '83 or late December?

A. Who were we dealing with?

Q. Yes.

A. In FRS?

Q. Yes. Who were the live bodies?

A. Steve O'Neal. Steven O'Neal who was the president of FRS.

Q. Anybody else?

A. No.

Q. The film that agent was going to buy for you, where was [9] it going to be processed?

A. At 1855 Greenleaf Avenue, Film Recovery's processing facility.

Q. Let's understand a little something about this agent that you appointed in December of '82 or January of '83.

You, Michael MacKay, were already an officer of that corporation, weren't you?

A. I resigned in December of 1982 as an officer of Film Recovery Systems.

Q. How long had you been an officer?

A. From its—1980, I think; from 1980.

Q. Actually FRS, as we are going to call it for this deposition to save words, was incorporated in 1980, wasn't it?

A. Yes.

Q. And B. R. MacKay put up—when I say B. R. MacKay, I'm talking about the corporation, always, B. R. MacKay put up the money for the creation of FRS, didn't it?

A. We put up some of the money.

Q. How much of the money?

A. I think it was $250,000.

Q. Who put up the rest?

A. There was some—I don't recall the exact participation. There was some money put up by Silver Recovery Systems, Incorporated.

[10] Q. How much?

A. I don't recall.

Q. Anybody else?

A. Money? No.

Q. Nobody put up any money but MacKay, B. R. MacKay and Silver Recovery Systems; is that your testimony?

A. Cash money, that's my recollection, yes.

Q. During the time 1980 through the time your management committee appointed this corporation your agent, who owned the shares in the corporation FRS?

A. Shares were owned—B. R. MacKay & Sons owned some shares, and a corporation MMS owned shares.

Q. What proportion of the shares did MacKay own?

A. Fifty percent.

Q. What proportion of the shares did Silver Recovery own?

A. None.

Q. What proportion of the shares did Metal Marketing?

A. Fifty percent.

Q. They didn't put up any money?

A. No.

Q. Now, you said some of the money was put up by Silver Recovery. What is Silver Recovery?

A. What is Silver Recovery?

Q. Yes. Is it a corporation? Is it a trade name? Is it a legal entity? What is it?

[11] A. Silver Recovery Systems that put up some money at that time was an Ohio corporation. Silver Recovery Systems, Incorporated, Ohio Corporation.

Q. And that is the entity that put up the money for the creation of FRS?

A. Did not put up money for the creation of FRS.

Q. Well, the funding, the financing of the operation; is that right?

A. That is the corporation, yes.

Q. Now, Silver Recovery Systems which you are just telling us about, is putting up money to fund FRS, an Ohio corporation, is and was a wholly-owned subsidiary of B. R. MacKay & Sons, Inc., is that right?

A. No, not correct.

Q. Well, what is B. R. MacKay & Sons, Inc.'s interest, if any, in Silver Recovery Systems?

MR. BRADLEY: At what point in time?

Q. (By Mr. Freeman) At any time from its creation up until right now.

A. Silver Recovery Systems was an Ohio corporation that was incorporated, I believe, in 1974. Sole shareholder, to my recollection, was Alvin Tolan. In June of 1980, B. R. MacKay & Sons bought all the stock of Silver Recovery Systems of Ohio. In January of 1981, Silver Recovery Systems of Ohio was dissolved.

[12] Q. Are we talking about Silver Recovery Systems of Ohio? That was not its official name, was it, or was it?

A. No. The official name was Silver Recovery Systems, Inc.

Q. And in June of '80, you bought all Tolan's stock?

A. Yes.

Q. For how much money?

A. I don't recall right now.

Q. Who bought the stock?

A. B. R. MacKay & Sons.

Q. Was it $5,000 or—

A. No.

Q. 500,000?

A. Neither.

Q. Somewhere in between?

A. No, it was more than that.

Q. More than that? A million dollars?

A. It was in that range. I don't recall the exact price.

Q. Well, you know, Mr. MacKay, you are not Mr. MacKay. You are the corporation. I'm just asking you, asking the corporation, trying to refresh its memory about a transaction in excess of a million dollars which happened less than three years ago. Can you help me?

A. We paid over a million dollars.

Q. And when did you dissolve it?

[13] A. As I recall, it was dissolved in January of 1981.

Q. What was it dissolved?

A. As I recall, when the negotiations for the purchase of the company based on advice from counsel for tax planning purposes, it was anticipated that that corporation would be dissolved at some point in time. I don't recall now the specific reasons. It was done on advice of counsel.

Q. And at the time it was dissolved, B. R. MacKay, Inc. owned all the shares?

A. Yes.

Q. Now, is it not the case, Mr. MacKay, that after that corporation was dissolved, that B. R. MacKay continued to use the name Silver Recovery Systems without the Inc. or the corporation on the end of it? Isn't that true?

Now, commencing in January '81, will you tell me just exactly what was Silver Recovery Systems without the Inc. and without the corporation?

A. it was the marketing division of B. R. MacKay & Sons.

Q. What does a marketing division do?

A. Market.

Q. You mean sell or buy? I'm not familiar with the term. I'm a lawyer, not a silver refiner.

A. Are you asking me what a marketing—would you repeat the question, please?

Q. I want to know what Silver Recovery Systems without the

* * *

[22] Q. What?

A. That didn't happen.

Q. Didn't you have an appraisal as of December 16, '82 of the assets—

A. Film Recovery had an appraisal of their processing equipment.

Q. But you didn't take over their operation?

A. That is correct.

Q. Like it says here?

A. That is correct.

Q. Let's go back to the beginning now. I seemed to have gotten the parties lined up.

Why is it that B. R. MacKay Film Division, according to your earlier testimony, operated in only January and February of 1983?

A. It was decided that B. R. MacKay & Sons no longer wanted to be involved in the scrap film processing business in that area.

Q. What area?

A. In the Chicago area.

Q. And so what did you do?

A. We quit buying film.

Q. Who is "we"?

A. B. R. MacKay & Sons had authorized Film Recovery Systems to be its buying agent to purchase scrap film. We [23] notified film—FRS that we no longer intended to purchase film, and told them to no longer purchase any film on our behalf.

Q. When was this?

A. February, either February 23rd or February 28th.

Q. Was that in writing?

A. No.

Q. February 23rd or February 28, 1983 you told FRS to stop buying film for your account?

A. Yes.

Q. And prior to that time, you had resigned as an officer of FRS, that being in December of '82, correct?

A. Yes.

Q. And this occasion that FRS was turning over the assets to you did not happen?

A. That is correct.

Q. Now, let's find out what—before we get to that, let me ask you this.

In this document discovery that we went through this morning in the boxes upon boxes, it is true, is it not, that you had in your possession—when I talk about "you", I'm talking about the corporate you—you had in your possession to show me the original cashouts of FRS checks, did you not?

A. Some of their checks.

Q. Why do you have FRS checks?

[24] A. Why do we have some of FRS checks?

Q. Yes.

A. For a period of time, our controller provided accounting services for them.

Q. What period of time?

A. It would have been sometime in 1982, 1981 through 1982.

Q. In addition to those particular documents, you provided me with files under number two with also copies of bills of lading for silver scrap or cannister or film or anything that has to do with silver coming out of Louisiana to B. R. MacKay, isn't that true, in 1978?

A. I don't recall if there was any film in those, scrap film.

Q. Well, what was it? What were you buying from various Louisiana entities from 1976?

MR. BRADLEY: To when?

Q. (By Mr. Freeman) To now.

A. Whom are you speaking of when you say, "What were you buying"?

Q. I'm only talking about MacKay.

A. MacKay—

Q. My question was, what was it that you, MacKay, was either buying or selling in Louisiana between 1976 and yesterday?

* * *

[31] break. Let's try not to break too long.

MR. STRACHAN: The deposition, as I understand it, is scheduled at 1:00. We'll resume with Mr. MacKay at 1:00?

MR. FREEMAN: Well, we are not going to start Mr. MacKay until I finish the 30(b)(6).

MR. STRACHAN: How long did you anticipate that the 30(b)(6) deposition would continue?

MR. FREEMAN: I figure probably about another hour.

MR. STRACHAN: One hour? Let's break for lunch.

(Whereupon, a lunch break was taken.)

(Whereupon, the deposition was resumed at 1:00 P.M.)

Q. (By Mr. Freeman) Mr. MacKay, as to the continuation of the 30(b)(6) deposition, and we have questioned you about Silver Recovery, Incorporated and Silver Recovery Unincorporated as a division of MacKay. I'm looking at a letter which was produced this morning dated July 11, 1983, which mentions Silver Recovery Systems Corporation,—Corp.—is that different from Silver Recovery Systems, Inc.?

A. I would have to see the letter to see what it's referring to. It would be my estimate that that refers to Silver Recovery Systems, Incorporated, Ohio corporation.

Q. In other words, there were not two corporations called Silver Recovery with a slight variation in the suffix?

A. Well, that is silver—I think that refers to Silver Recovery Systems, Inc., the Ohio corporation. There was not, [32] to my knowledge, a Silver Recovery Systems Corporation as opposed to Silver Recovery Systems, Incorporated.

Q. This letter dated July 11, 1982, Mr. Bradley says to Mr. Denlow, "As I indicated to you previously, Silver Recovery Systems Corporation has been merged into B. R. MacKay & Sons, Inc."

To your knowledge, is your attorney speaking in your behalf talking about the acquisition of Silver Recovery Systems, Inc. and its subsequent dissolution when you all owned all the shares?

MR. STRACHAN: Read the question back.

(Whereupon, the question was read back.)

MR. STRACHAN: Do you understand the question?

THE WITNESS: Are you asking me is he speaking on my behalf?

Q. (By Mr. Freeman) We know he's speaking on your behalf, so I won't ask you that. What I'm asking is, to your knowledge, is he talking about the same series of events which we discussed earlier when, number one, you bought all the shares of Silver Recovery, Inc., and you subsequently caused it to be dissolved?

A. I think that would be the case.

Q. Now, I'm looking at the answer to a draft of an answer to a verified complaint in number 83L1005 in the Circuit Court of Cook County, Illinois, County Department Law Division

* * *

[39] about.

Can you tell me when this brochure was prepared and by whom?

MR. BRADLEY: If you know.

THE WITNESS: I don't know. If by the brochure you mean this device with the attachments included, I don't know who it was prepared by, nor would I know when it was prepared. I'm surprised to see these pictures in here, because it was not my understanding that those were distributed to customers.

Q. (By Mr. Freeman) Well, this brochure says, "Silver Recovery Systems, Inc., a subsidiary of B. R. MacKay & Sons, Inc. with Michael MacKay and his team taking care of things back at the refinery, and us in the field personally to oversee your recovery system, you can rely on SRS to recover all of your silver."

They were your marketing arm at the time of the distribution of this brochure?

A. Silver Recovery Systems was the exclusive marketing agent.

Q. Now, if I have my dates correct, it was in January of '81 Silver Recovery Systems, Inc., the corporation was dissolved. For the next seven months, Silver Recovery Systems was simply a division of MacKay, is that right?

A. For approximately that time.

* * *

[45] an office at that address.

A. No.

Q. What?

A. No.

Q. Let's go backwards and look at I-4. What's the heading on that?

A. 1855 Greenleaf Avenue, Elk Grove Village, Illinois.

Q. And whose document is it?

A. B. R. MacKay & Sons Film Division.

Q. I'll ask you again. Did B. R. MacKay & Sons, Inc. Film Division have a place of business at 1855 Greenleaf Avenue, Elk Grove Village, in January and February of 1983?

A. We had no employees there. We had that listed as an address for January and February.

Q. Now, this letter that was addressed to Mr. Stucker at MacKay in Chicago, he wasn't your employee. Is this the confirmation from Film Recovery for this shipment?

A. It doesn't appear to be. There is 2,500 ounces listed on this one, and 250 listed on that one.

Q. Let's turn this one over and look at J-3. What's the number of ounces?

A. 2,500.

Q. I notice that there is a notation at the bottom, "Stucker advised it is a clerical error, should be 2,500." Do you see that?

[46] A. Uh-huh (affirmative).

Q. Now. I'm going to show you J-4. That's the settlement report. It comes from MacKay at Elk Grove Village, doesn't it?

A. That's the heading on the settlement report, yes.

Q. And it's for the same 2,500 ounces, right?

A. Let me check. It is for 2,500 ounces; whether it's the same or not—

MR. STRACHAN: But there is another notation, Counsel, on the bottom that it's a mistake. He can't tell whose handwriting, if it's the same as the one on the previous document that indicated it was a mistake also.

Q. (By Mr. Freeman) Where is that, an indication it's a mistake?

A. Right here. It says, Mistake.

Q. Is this MacKay's check for 2,500 ounces?

A. Well, there is a check dated and a check number and indications here, but there is nothing to identify it as a MacKay check. You'd have to check the records to see if check 1267 was, in fact, for this. That's a copy of the voucher part of a check with no indication as to whose check it's on, who the check is made out to.

Q. Let's see. Didn't we ask for a series of checks which would include that check?

This J-7, this is another settlement sheet to [47] New Orleans Silversmiths on the case letterhead at Elk Grove Village, is it not?

A. It's B. R. MacKay & Sons/Film Division at 1855 Greenleaf Avenue.

Q. And there is no doubt about this check being MacKay's check, is it?

A. You show me here a copy of a complete check with a voucher on which I can see whose bank account the check was written on and to who it was made out to so I can say yes, it's B. R. MacKay & Sons' check. It says.

Q. Now here is a bill of lading, February 17th, from Silversmiths to B. R. MacKay in Chicago.

A. B. R. MacKay & Sons, Inc. Film Division, 1855 Greenleaf Avenue.

Q. For 109 drums. This is Spirit, Inc.'s invoice to Silversmiths for 109 drums, and it shows consignee Silver Recovery. It is dated February—date shipped February 17, 19, I assume, '83. They don't have a date on that.

Do you know why the consignee is Silver Recovery?

A. No, I don't.

Q. Did you or anybody in your employ instruct Spirit to show the consignee other than that which is shown on the bill of lading?

A. No, nobody in my employ that I know of had ever spoken to Spirit by this date, to my knowledge, assuming that's 1983.

[48] Q. Here is a dated bill of lading from New Orleans Silversmith to B. R. MacKay, Inc. Film Division, Elk Grove Village for 123 drums. Do you see that one?

A. Yes, I see it.

Q. And this is the settlement, and this settlement is dated March 17, 1983. It's on Film Recovery Systems Corporation form. Do you know why when the previous settlement sheets were all on B. R. MacKay's form, why this one is on Film Recovery form?

A. As I previously testified, February, I believe it was the 22nd, B. R. MacKay & Sons Film Division stopped purchasing film. So we would not have purchased this film.

Q. Did you tell New Orleans Silversmith about that?

A. No.

Q. Did you tell anybody about it?

A. Told Film Recovery, and they indicated to us that when people call in to head silver, they would make sales, they would so inform them B. R. MacKay Film Division was no longer purchasing film. They indicated to us they would not, either.

Q. Here is the freight bill for—that's a bad copy. It's dated March 17, assuming this is 1983. Do you know why Spirit, Inc. put Silver Recovery Systems on there?

A. No, I do not.

Q. Is this a picture of this M, is that the picture of

* * *

[51] A. Yes.

Q. And you were the president of B. R. MacKay?

A. B. R. MacKay & Sons, Inc., yes.

Q. It says B. R. MacKay Company. He didn't make the lease. That's your signature?

A. Yes.

Q. Now, I show you two exhibits here which purported to be Exhibits O and P. Do you recognize that?

A. No. It's the first time I've ever seen it, so I didn't recognize it from that.

Q. Wasn't Silver Recovery Systems your own division after it had been unincorporated?

A. This Silver Recovery Systems, this is a check on Silver Recovery Systems, Zions First National Bank in Salt Lake City. Excuse me. What was your question?

Q. My question was is this actually MacKay's account and MacKay's money paying the rent on the property in Chicago?

A. Yes.

Q. What?

A. Yes.

Q. MacKay's money?

A. By MacKay's, you mean B. R. MacKay & Sons?

Q. Inc. B. R. MacKay & Sons, Incorporated. That's the only MacKay we're talking about unless you want to tell me [52] about some other MacKay operation that becomes involved here that I should know about. There were no other MacKay corporations, partnerships or other proprietorships that were involved in this silver recovery, is there?

A. No.

Q. So now we've got the January rent and the February rent. Take a look at that one check number 1244.

A. Uh-huh (affirmative).

Q. Whose post office box is that? It's not very clear. I can't read it.

Do you have a post office box, meaning MacKay? Do they have a post office box similar to 26748 Salt Lake City, Utah?

A. Yes.

Q. It says MacKay's post office box?

A. Yes.

Q. And the telephone number, I can't read it. 263-2863. That's your phone number?

A. Yes.

Q. Right here where we're sitting?

A. No.

Q. Where?

A. At our office.

Q. Where is your office?

A. 6320 South 900 East.

[53] Q. And when was this account opened at Zions First National Bank with the name Silver Recovery Systems on it?

A. I think that would have been opened in January of 1983.

Q. Is it still open?

A. No, I don't believe so.

Q. Who were the signators on that bank account?

A. There were two people. I think there were—I think there was two signators required on the check. I think there were three people working for Film Recovery Systems in Chicago who were authorized to sign on the check.

Q. To people in Chicago?

A. Yes, to employees of FRS. There were three, I believe, who were authorized to sign. It required two signatures. I don't—I assume—I don't recall other than that here in Salt Lake who was authorized to sign on that account.

Q. Who put the money in that account?

A. B. R. MacKay & Sons.

Q. Was it simply funded out of the general treasury, or did it have—was it profits from any particular deals?

A. I think it was funded generally.

Q. Generally funded. And the people that were—you say Love is one of them and the other is, it looks like, Sadasak or something. Those were employees of FRS?

A. Yes.

[54] Q. And they could sign checks on what was, in effect, MacKay's account?

A. We had a procedure in which Glen Love had to call up and check with our controller, receive permission to issue the checks, and assuming our controller said that he could, then he would issue them.

Q. Who was your controller?

A. Fred Haynie.

Q. He is the controller of MacKay & Sons, Incorporated?

A. Yes.

Q. Do you have any other controller?

A. No.

Q. Well, I want to show you finally Exhibit Q. Take a look at this one. Did you authorize—when I say "you", I mean B. R. MacKay & Sons—did you authorize the issuance of this particular document on January 6th, 1983?

A. No.

Q. Who did?

A. I don't know.

Q. Who is Glen Love, controller of Silver Recovery Systems?

A. Glen, whoever, was an employee of Film Recovery Systems.

Q. Isn't Silver Recovery Systems your outfit?

A. Well, I don't know who is. I did not cause nor did [55] anyone working under my employ, speaking for B. R. MacKay & Sons, cause this document to be printed, nor this letterhead to be printed. So I don't know what he's referring to there.

Q. Well, this says, "Attention, effective January 1, 1983 all invoices formerly billed to Film Recovery Services not to be billed to Silver Recovery Systems. Thanking you for your anticipated cooperation, I remain, Glen Love, controller, Silver Recovery Systems."

Now, let me understand this. You set up MacKay Film Division in Chicago for starting this, then to see how it would work; is that right?

A. I wouldn't say it was set up in Chicago.

Q. Well, it had an office in Chicago, according to the settlement sheets.

A. Shipping address in Chicago, yes.

Q. And there was a bank account in Utah?

A. That is correct.

Q. And it was under the name of Silver Recovery, correct? That's the checks that paid the rent?

A. Yes.

Q. And there was also a checking account called B. R. MacKay Film Division, right?

A. B. R. MacKay & Sons, Inc. Film Division.

Q. That was a different checking account from the [56] B. R. MacKay & Sons, Inc. checks that we have seen thus far?

A. I don't recall what ones we've seen thus far.

Q. Well, these are the ones we've seen thus far. Not that one, because it doesn't have a date on it. This one here. That's a Film Division check.

A. Would you restate that question?

Q. She doesn't have to restate. I was confused.

This is a Film Division check, B. R. MacKay & Sons, Inc. Film Division?

A. Yes.

Q. Was this check used in entirely for your operations in Chicago?

A. No. This checking account was used to pay for the scrap film that had been purchased.

Q. In Chicago?

A. Through FRS, yes.

Q. How about scrap film that was purchased here in Salt Lake City?

A. We don't purchase that much of it here in Salt Lake. I'm not sure whether that would be paid out of that account or not.

Q. Any MacKay checks that went to Luetkemeier that we asked you before would have been from the Film Division checking account or from the regular MacKay checking account?

A. Any checks that had gone to Luetkemeier would have [57] been from Silver Recovery Systems, Inc. of Ohio, the checking account out of Cleveland and/or Profit Recovery Systems, Inc. checks.

Q. But in any event, why would all invoices formerly billed to Film Recovery Systems now be billed to Silver Recovery Systems?

A. I don't know. My recollection is that the first we saw that document was when you produced it.

MR. STRACHAN: We've been at this for an hour. Do you anticipate continuing?

MR. FREEMAN: You mean the 30(b)(6) deposition?

MR. STRACHAN: Right.

MR. FREEMAN: Yes, I intend to conclude it within a very few minutes.

Q. (By Mr. Freeman) Let me ask you this. Do you know Jerry Pet?

A. Is that Jerry Pet? An employee of Film Recovery Systems?

Q. Do you know a man named Jerry Pet?

A. I know a man named Jerry Pet, yes.

Q. If Jerry Pet says that as of January, 1983 he was employed by Silver Recovery Systems, would that be correct?

A. No.

Q. What?

A. No.

* * *

[61] freighting by arranging for freight. Spirit to be able to pick up material and deliver it to the location, our location for processing, do you know anything about that, his activities in that regard?

A. Mr. Pet was the employee of Film Recovery Services during the month of January. Film Recovery Systems was to act as a buying agent for B. R. MacKay & Sons

Film Division for scrap film. What functions that he performed under the directions of Steve O'Neal who was in charge of Film Recovery Systems, I am not specifically aware of.

Q. Do you know who paid Mr. Pet his salary?

A. In January and February of 1983, his salary was paid through the checking account of Silver Recovery Systems which we've already discussed.

Q. He was paid by Silver Recovery Systems with MacKay's money?

A. Yes.

Q. But you deny that he was an employee of Silver Recovery Systems?

A. Yes.

Q. And when he said he reported to Steve O'Neal, Mike MacKay and Steve Bradley out of Salt Lake City and Fred Haynie out of Salt Lake, is that true? I'm asking you as a corporation now. Do you know whether—forget about Steve O'Neal. Tell me, did he report to Mike MacKay?

[62] A. He was instructed to—let me go back. What do you mean by report to?

Q. Well, an inferior reports to his superior, tells him what he's been doing and asks for instructions. That's the way I define report.

A. In Salt Lake City we never gave Jerry Pet instructions, either Fred Haynie, Steve Bradley or myself. Never gave Jerry Pet instructions as to what film to purchase, what prices to pay, how to arrange for the trucking or that kind of thing.

We attempted on a number of occasions to get him to send us documentation as to the activity that was going on in January unsuccessfully. There was one point in time where we attempted to get him to reduce the volume of film that he was buying, but there was never any direct

cause-effect relationship between us that he would call us and ask us, can I do this or should I do that, and we would say yeah or nay, and he would take action based on that.

Q. How much money did MacKay fund in total the Silver Recovery account at Zions Bank which the checks of which were signed by Love and someone else?

A. I don't know. There would have been the checks that were—Love, he didn't sign the Zions account.

Q. Love signed the checks. Love and somebody else whose name we can't make out.

[63] A. Excuse me, that's Silver Recovery Systems.

Q. That's right; that's the account.

A. I thought you said B. R. MacKay & Sons Film Division account.

Q. At this point, I could be confused. The Silver Recovery acount, Zions Bank.

A. The exact amount of money, I don't know. That account was set up to pay those operating expenses that were necessary in order to keep the Film Recovery System's plant operating. Initially through the month of January while we could evaluate it, as it turned out, it went into maybe towards the end of February.

Q. $5,000?

A. Obviously there is a check you've shown me there with $7,000 on it. I have no idea the amount.

Q. $500,000?

A. I doubt that very much. It would be operational expenses, similar to rent.

Q. How often in January and February did you speak to Pet on the telephone?

A. There was a period of time where we were on probably, daily contact, I would assume.

Q. Pet says sometimes it was three or four times a day.

A. That's daily contact.

Q. I say even more than daily, sometimes three or four [64] times a day. Would that—

A. There would be days when it was three or four times, yes.

Q. Would he call you, or would you call him? When I say "you", I mean whoever at the MacKay Corporation was doing the calling or receiving.

A. Well, I believe he called in the morning to tell how much product he had bought and how much silver had to be priced, and items, you know, similar to the carrying on the purchasing of all of that film. He was the one who informed us of all of that, so I assume he would call us sometimes, and we would call him sometimes. And that would show up—would you call collect, or would that show up on the MacKay phone bill?

A. I would imagine he would call on the FRS phone, and we would have called back on our phone.

Q. Would he call you collect?

A. Not to my knowledge.

Q. When I showed you one of those Spirit invoices, you said we didn't know about Spirit at that time. When did you first know about Spirit or West Coast Spirit or Shureway?

A. What do you mean by know about?

Q. When did you start dealing with them?

A. I never dealt with them. Well, there was one time they shipped, I think, two or three truckloads of material to

* * *

[70] All of a sudden I hear they are in 1875 Greenleaf, so I assume it was FRS.

Q. Who paid the rent?

A. Must have been FRS.

Q. How about that Silver Recovery bank account in Utah at the Zions Bank? Did the rent for 1875 come out of that bank account?

A. Not to my knowledge.

Q. Do you know, has that bank account been closed?

A. I think it has.

Q. What?

A. I think it has.

Q. And in the production that we had here today, do you have the checks for that bank account; maybe not, because I hadn't thought of it.

A. I figured whatever you asked that he had provided.

Q. In any event, whether I requested, whether I've seen it, you have the checks, the cancelled checks for the now closed out Silver Recovery bank account in the Zions Bank; is that correct?

A. Yes.

Q. That's in your custody?

A. Yes.

Q. Meaning the corporation's custody?

A. Yes.

* * *

[76] taken by Mr. Bleeker who represents West Coast Spirit.

Q. Now, I'm going to refer to a sworn statement dated September 7th given by Charles Edward Kirshbaum, same place, office of Mr. Bleeker. Larry Tegland, that was in Indianapolis—Larry Teglan was the notary public. Do you know Charles Edward Kirshbaum?

A. Yes.

MR. BRADLEY: We'd also make the same request that we be furnished copies.

THE WITNESS: Charles Kirshbaum was an employee of Film Recovery Systems Services.

Q. (By Mr. Freeman) He says he was an employee of Silver Recovery Systems. Do you disagree with that?

A. Yes, I disagree with that.

Q. He says he was employed from January 1st until the middle of March or end of March. Do you disagree with that?

A. Yes, I disagree with that.

Q. Whose checks paid Kirshbaum, if you know?

A. Kirshbaum was paid, as was Pet, on the Silver Recovery Systems bank account that we've previously talked about. It's not my recollection that those payments went on through the middle or end of March.

Q. But we'll be able to tell when we see those checks?

A. Yes.

Q. Mr. Kirshbaum says that at the end of February of 1983,

* * *

STATE OF UTAH
COUNTY OF SALT LAKE—ss:

I, JOANNE PRATT, a Certified Shorthand Reporter and Notary Public for the State of Utah, certify:

That the foregoing deposition of MICHAEL MacKAY was taken before me pursuant to Notice at the time and place therein set forth, at which time the witness was put on oath by me;

That the testimony of the witnesses and all objections made at the time of the examination were recorded stenographically by me, and were thereafter transcribed;

That the foregoing deposition is a true record of the testimony and of all charges made by the witness, and of all objections made at the time of examination.

I further certify that I am neither counsel for nor related to any party to said action, nor in anywise interested in the outcome thereof.

IN WITNESS WHEREOF, I have subscribed my name and affixed my seal this 13 day of Oct., 1983.

/s/ Joanne Pratt
CSR

My Commission Expires: 1-14-85

APPENDIX E

Federal Rules Of Civil Procedure 26(c)

(c) **Protective Orders.** Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the discovery not be had;

(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition after being sealed be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.